90-22

No. _____

Supreme Court
FILED
APR 27 199
JOSEPH F. SPANIOL
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

LEVESTER THOMPSON, M.D.,

Petitioner,

vs.

WISE GENERAL HOSPITAL, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE LOWER COURT ERRED IN NOT PRESENTING THE MOST TANGIBLE EVIDENCE REVEALED IN CAMERA WHICH ESTABLISHED THE RESPONDENT'S CAUSE OF CIVIL RIGHTS ACTIONS.

II.

WHETHER THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN UPHOLDING THE LOWER COURT'S DECISION AFTER STATING WITH GREATER SPECIFICITY THE CIVIL RIGHTS ACTIONS AGAINST THE PETITIONER BY THE RESPONDENTS.

III.

WHETHER THE PETITIONER HAS SUFFICIENTLY ALLEGED FACTS TO STATE A CAUSE OF ACTION FOR CONSPIRACY UNDER 42 USC SECTION 1985(3).

IV.

WHETHER THE PETITIONER HAS SUFFICIENTLY ALLEGED THAT THE ACTION TAKEN BY THE RESPONDENTS WAS "STATE ACTION" (DONE UNDER COLOR OF STATE LAW), AND WHETHER THE PETITIONER HAS SUFFICIENTLY ALLEGED THE EXISTENCE OF CONTRACT RIGHTS WITH WHICH THE RESPONDENTS INTERFERED.

V.

WHETHER THE PETITIONER'S CIVIL RIGHTS CLAIMS UNDER BOTH SECTION 42 USC 1981 AND 1985 ARE NOT BARRED BY THE APPLICABLE

STATUTE OF LIMITATIONS AS TO RESPONDENT ST. MARY'S HOSPITAL, INC.

VI.

WHETHER THE PETITIONER IS ENTITLED TO A HEARING TO CLEAR HIS NAME WHEN CLEARLY A DEFINED CIVIL RIGHTS ACTION WAS FORCED UPON HIM.

VII.

WHETHER THE DISTRICT COURT JUDGEMENT IS INCORRECT AND INAPPROPRIATE IN CONSISTENTLY IGNORING THE EXISTENCE OF PETITIONER'S COUNSEL BY REPEATEDLY ISSUING ORDERS DIRECTLY TO THE PETITIONER HIMSELF RATHER THAN TO PETITIONER'S COUNSEL.

VIII.

WHETHER IT IS PROPER FOR THE DISTRICT COURT TO MAKE IMPROPER USE OF RULE 11 SANCTIONS WHEN IT WAS PUBLIC KNOWLEDGE THAT FINANCIAL PROBLEMS EXISTED WITH THE PETITIONER'S COUNSELS.

IX.

WHETHER THE DISTRICT COURT ERRED IN NOT UPHOLDING AN EARLIER ORDER ALLOWING SUMMONS TO BE PROCESSED ON THE RESPONDENTS.

LIST OF PARTIES

Petitioner LEVESTER THOMPSON, M.D. (hereinafter referred to as "Petitioner"); and respondents ST. MARY'S HOSPITAL, INC. (hereinafter referred to as "St. Mary's"); WISE ARH GENERAL HOSPITAL (hereinafter referred to as "Wise"); NORTON COMMUNITY HOSPITAL & LONG TERM CARE FACILITY (hereinafter referred to as "Norton"); O. DAVIS BEVINS (hereinafter referred to as "respondent Bevins"); RUBY SALYER (hereinafter referred to as "respondent Salyer"); ANN CHRISTINA SULLIVAN (hereinafter referred to as "respondent Sullivan"); MARTY PRINCE, M.D. (hereinafter referred to as "respondent Prince"); CHARLES FULTON, M.D. (hereinafter referred to as "respondent Fulton"); ISAM ZEBDAH, M.D. (hereinafter referred to as "respondent Zebdah"); A.W. NORTH, M.D. (hereinafter referred to as "respondent North"); CHARLES P. MAINE, M.D.

(hereinafter referred to as "respondent Maine"); and R. CARTEGENA, M.D. (hereinafter referred to as "respondent Cartegena"). Henceforth, St. Mary's, Wise, and Norton are also collectively referred to as "respondent hospitals".

All of the respondents are indispensable, necessary, and proper party respondents for the following reason:

1. All averments of alleged wrongful conduct apply equally to the name respondents.

2. The said respondents are citizens and residents of Wise County, Virginia, and are subject to the jurisdiction of this court as to both service of process and venue.

3. Substantial justice may not be done to this cause without the said respondents.

4. Respondents Prince, Fulton, North, and Maine are white males who were, at all times relevant herein, physicians licensed to practice medicine in the State of Virginia.

5. Respondents Isam Zebdah, M.D. and R. Cartegena, M.D. are foreign-born males who were, at all times relevant herein, physicians licensed to practice in the State of Virginia.

6. Each of the physician respondents are and were, at all times relevant herein, engaged in the private practice of medicine in Wise County, Virginia. Like the petitioner, each respondent physician held on-staff physician privileges with each of the respondent hospitals.

7. Respondent Wise is an incorporated, private, not-for-profit corporation. Wise is incorporated in the State of Kentucky and engages in the administration of medicine and medical care in Wise County, Virginia and other sites.

8. Respondent St. Mary's is a private, non-stock corporation which, at all times relevant herein, was engaged in the administration of medicine and medical care in Wise County, Virginia.

9. Respondent Norton is a non-profit corporation organized under the laws of the State of Virginia. Norton was and is engaged in the administration of medicine and medical care in Wise County, Virginia, and operates both a hospital and a nursing home in Norton, Virginia.

10. Respondent Bevins is a white male who, at all times relevant herein, was employed by Norton as its administrator. Respondent Bevins was appointed to his position as administrator by the governing board of Norton to act on behalf of the governing board in the overall administrative management of the Hospital.

11. Respondent Sullivan is a white female who, at all times relevant herein, was employed by St. Mary's as its administrator. Sullivan was appointed to her position as administrator by the governing board of St. Mary's to act on behalf of the governing board in the overall administrative management of the Hospital.

12. Respondent Salyer is a white female who, at all times relevant herein, was employed by Wise as its administrator. Salyer was appointed to her position as administrator by the governing board of Wise to act on behalf of the governing board in the overall administrative management of the Hospital.

13. Petitioner is a black male who, at all times relevant herein, was a physician licensed to practice medicine in the State of Virginia. Petitioner was engaged in the practice of medicine in Wise County, Virginia. He held on-staff physician privileges with each of the respondent hospitals prior to the illegal and discriminatory acts engaged in by the respondents which are more fully set forth herein.

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OPINIONS BELOW

On February 23, 1989, the Western District Court of Virginia (Big Stone Gap Division) entered an order in accordance with a Memorandum Opinion to Dismiss the Petitioner's Claims and Strike It from the Docket of This Court. On appeal (March 27, 1989), a panel of the Fourth Circuit Court of Appeals issued an unpublished decision filed January 30, 1990, affirming this judgement. On March 13, 1990, the Court of Appeals denied the petition for rehearing and the suggestion for rehearing in banc. No member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and therefore, this was denied also.

JURISDICTION

The Court of Appeals for the Fourth Circuit issued an unpublished decision filed January 30, 1990, affirming the District Court's judgement issued on February 23, 1989. On March 13, 1990, the Court of Appeals denied a Petition for Rehearing with Suggestion for Rehearing

in banc. The Suggestion for Rehearing in banc was also denied on this date as no member of this Court or the panel requested a poll on it. On April 27, 1990, a timely Petition for Certiorari was filed within the 90 days after entry of the appealed judgement. This Court has discretionary jurisdiction to review this case under 28 USC 2101(c), SCR 20(2).

RAISING THE FEDERAL QUESTIONS

The Petitioner alleged a civil action based upon race discrimination. The District Court later allowed a second Amended Complaint of the case to be filed as it fulfilled all aspects of the Respondents' Motion to Dismiss. The District Court finally ruled on the case from material placed before it, after the petitioner was positioned by the Court, to act as pro se. Although no parts of the materials presented in camera to the Court by the petitioner had been ruled upon, the Court insisted on dismissal of the case based on its superficial merits and on certain untimely service processes. These civil action

claims were again raised before the Fourth Circuit Court of Appeals of Virginia, which affirmed the District Court's ruling.

CONCISE STATEMENT OF THE CASE

1. On December 23, 1986, Charles L. Smith, Esquire, (hereinafter referred to as "Attorney Smith"), acting as counsel for the petitioner, filed the original complaint and alleged 42 USC Section 1981, 42 USC Section 1985(3), and 42 USC Section 1986 as jurisdictional grounds. (See Appendix A.)

2. Prior to June 8, 1987, Donald F. Mason, Jr., Esquire (hereinafter referred to as "Attorney Mason") and D. Bruce Shine, Esquire (hereinafter referred to as "Attorney Shine") accepting Petitioner's case, in camera material was required by these two attorneys; and it was based on this information (see Appendix B) that Attorneys Mason and Shine agreed to represent the Petitioner. This legal representation was in addition to that of Attorney Smith.

3. With the implication of Rule 11 sanction (see letter to Petitioner dated September 30, 1988, written by William M. Eskridge, attorney for Defendant Norton in Appendix C), counsel for the petitioner on October 3, 1987, filed a more definite statement and/or amended complaint alleging violations of 42 USC Section 1981 and 42 USC Section 1985(3).

4. On October 14, 1987, petitioner by counsel, moved pursuant to Rule 41(a) FRCP, for a Voluntary Dismissal/Non-Suit as to the following individual respondents Bevins, Prince, Fulton, Sullivan, Zebdah, Lerschlolarn, Banchuin, Salyer, North, Maine, and Cartegena, **with objections** made by Attorney Smith.

5. On February 24, 1988, Attorneys Shine and Mason moved the court for an order allowing them to withdraw as counsel of record to the petitioner in this cause, which order was granted and entered February 25, 1988.

6. On April 27, 1988, petitioner retained Sa'Ad El-Amin, Esquire (hereinafter referred to as "Attorney El-Amin"), as counsel, in addition to Attorney Smith. The original complaint and amended complaint failed to fully set forth petitioner's cause of action against the respondents. The petitioner moved the court for an order allowing him to file a second amended complaint and motion to add party respondents.

7. The second amended complaint (see Appendix D) set forth the specific incidents which established petitioner's cause of action and brought back in the following defendants who were voluntarily dismissed, pursuant to Rule 41(a) of the FRCP on October 14, 1987: O. David Bevins; Ann Christina Sullivan; Ruby Salyer; Marty Prince, M.D.; Isam, Zebdah, M.D.; A.W. North, M.D.; Charles P. Maine, M.D.; and R. Cartegena, M.D.

8. The petitioner also added as jurisdictional grounds, 15 USC Sections 1, 2, 15, 22, and 26 (Sherman

Antitrust Act); 28 USC 1331, 1337, and 1343; 42 USC Sections 1981, 1985(3), and 1988; and Code of VA 1950, as amended, Sections 18.2-499 and 18.2-500.

9. Count I of the second amended complaint set forth the allegations of conspiracy by all of the respondents to deprive petitioner of his livelihood based upon his race.

10. Count II of the second amended complaint sets forth allegations that each defendant combined, associated, agreed, and mutually undertook for the purpose of willfully and maliciously injuring petitioner in his reputation and profession in violation of 18.2-499 and 18.2-50, Code of VA 1950, as amended.

11. Count III of the second amended complaint sets forth allegations that the respondents singly or collectively:

A. conspired and/or combined unsubstantiated charges of inadequate care and negligent treatment to

the attention of the ad hoc committee of the respondent hospitals; or

B. applied to the petitioner a standard of care which was not otherwise applied to or enforced against other physicians who consulted with and treated patients of the petitioner; or

C. upheld recommendations of suspension and termination of petitioner's privileges at the respondent hospitals without sufficient evidence to conclude that petitioner deviated from the appropriate standard of care required by the hospital for physicians to obtain and retain staff privileges, thus violating the antitrust laws of the United States.

12. Count IV of the second amended complaint set forth the allegations that the respondents interfered with the contractual rights created between the petitioner and each of the respondent hospitals in violation of 42 USC Section 1981.

13. Count V alleged that the respondent St. Mary's, through its hospital administrator, breached a written contract between the petitioner and St. Mary's by failure to provide for both a hearing and appellant review proceeding to determine if the petitioner's privileges would be terminated in accord with St. Mary's by-laws.

14. As this second Amended Complaint now fulfilled each and all of the orders entered by the judge on March 30, 1987,[1] the judge entered an order on July 11, 1988:

> . . . allowing second amended complaint to be filed. Old defendants are granted 20 days from this day to respond. New defendants allowed 20

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[1] ". . . entered that petitioner shall specify in a more definite statement as to each respondent, in what manner he or it acted under color of state law; petitioner shall state with regard to each respondent whether or not he had an agreement or contract with said respondent; and if so, whether or not said agreement was in writing or otherwise, and the general nature of the agreement; or if there was no agreement between petitioner and particular respondent, whether or not any respondent acted to violate an agreement between petitioner and any other party to suit and if so, which party; petitioner shall state which respondents committed libel and slander against him and nature of the libel or slander and approximate time frame which this occurred; petitioner shall state which respondents tortiously interfered with contract and specify which contract said respondents tortiously interfered with, with regard to conspiracy; petitioner shall state whether or not he contends that there was only one conspiracy or more than one conspiracy, whether or not all of the doctors and hospitals were engaged in the same conspiracy, or whether or not there was more than one conspiracy between various doctors and hospitals; and if so, the general nature of the conspiracy.

> days from date of service to respond. Counsel for plaintiff directed to provide appropriate number of copies of second amended complaint and summonses to clerk to be marked "filed" and summons to be prepared for service.

However, on July 29, 1988, Attorney El-Amin filed a motion to withdraw as counsel for the petitioner. On August 8, 1988, an order (see Appendix E) was entered:

> . . . Motion of Sa'ad El-Amin to withdraw as counsel for plaintiff was granted; . . . . The Court directs the Clerk not to issue process on the unserved defendants until such time as new counsel is employed and agrees to accept responsibility for the pleadings of this case pursuant to Rule 11 FRCP. Plaintiff is granted 30 days to employ new counsel. [Emphasis added]

15. On August 10, 1988 the Attorney Smith also motioned for leave, and this motion was granted by the court on August 12, 1988 (see Appendix F).

16. On October 7, 1988, a hearing on the Motion to Dismiss was presided by the Honorable Glen M. Williams. On the morning of October 7, 1988, before the hearing, a long distant phone call from petitioner's would-be new law firm of Ferguson, Stein, Watt, Wallas & Adkins, P.A., requesting more time to take and defend

this cause was denied. The request, being denied by the judge, forced the petitioner to represent himself as pro se.

17. On February 24, 1989, the district court judge entered a Memorandum Opinion and Order dismissing the petitioner's claims and had the case stricken from docket of this court (Appendix G).

18. A Notice of Appeal to the Fourth Circuit Court was filed on March 27, 1989 by the petitioner as pro se. The Court of Appeals for the Fourth Circuit Court issued an unpublished decision filed January 30, 1990, affirming the District Court's judgement (Appendix H).

19. On February 12, 1990, petitioner filed a Petition for Rehearing with Suggestion for Rehearing in banc.

20. On March 13, 1990, the Court of Appeals denied the Petition for Rehearing, and because no member of this Court or the Panel requested a poll on the suggestion for rehearing in banc, this was also denied on March 13, 1990 (see Appendix I).

21. This Petition for Certiorari was timely filed on April 27, 1990.

CONCISE ARGUMENTS

I. Petitioner has sufficiently alleged facts to state a cause of action for conspiracy under 42 USC Section 1985(3).

Based on Griffin v. Breckenridge, 404 U.S. 88, 102 (1971); United Broth. of Carpenters & Joiners v. Scott, 463 U.S. 825 (1983); Grossling v. Ford Memorial Hospital, 614 F. Supp. 1051 (1985), the petitioner has demonstrated that a conspiracy existed between all of the named respondents. Each with expressed knowledge of the other's action engaged in a concerted action to deprive petitioner, by reason of his race, of his livelihood. The general nature of the conspiracy was to remove petitioner from his position with the respondent hospitals and to cause petitioner to lose all hospital privileges therein. The proximate cause of the respondents' concerted and conspiratorial wrongful acts was to deny petitioner the full privileges to which he is entitled in the

practice of his trade as a physician. The actions of the respondents constitute a continuing violation of 42 USC Section 1985(3). In this instance, whether the hospitals are public or private is of no consequence. No element of state action is necessary to state a claim under Section 1985(3) for conspiracy against black persons because of their race. Eggleston v. Prince Edward Volunteer Rescue Squad, 569 F. Supp. 1344 (1983).

The petitioner in this action is a proper party. Subsection (3) of 42 USC Section 1985 provides that any party so injured or deprived may have an action. Moreover, the respondents are proper parties. The statue for its language applies only where "two or more persons in any state or territory conspire" to deprive another of his civil rights. See 1985(3). The petitioner has shown that there was a single plan between the respondents that was shared in general, and that each respondent revoked the petitioner's staff privileges in furtherance of the conspiracy causing injury to the

petitioner. Pillette v. Detroit Police Dept. 661 F. Supp. 1145 (E.D. Mich. 1897).

The respondents in the case at bar are all corporations engaged in the administration of medicine and medical care in Wise County, Virginia. A corporation has the capacity to sue and be sued, and as an incident to this, occupies the same position as a natural person. Baltimore & O.R. Co. v. Gallahue's Adm'ns., 53 Va. Code (12 Gratt) 655 (1885). Thus, the acts of an agent are the acts of a corporation. Elbe v. Wausau Hospital Center, 606 F. Supp 1491 (1985). The general rule that agents of that corporation constitute a single legal entity and therefore cannot conspire with the corporation by which they are employed does not apply to this case. Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972). The petitioner does not allege that the corporate employees conspired with the corporation in violation of Section 1985(3). But rather, the corporations as entities conspired together to deprive the petitioner of

his equal right to conduct business because of his race, causing damage to his medical practice.

A corporation's capacity to be sued is governed by the laws of the state in which the corporation was organized. Wright v. Carey Canadian Mines, Ltd., 522 F. Supp. 627 (1981). Since, under Virginia law, a corporation can sue and be sued in its own name like a natural person, a corporation can be held responsible for damages done in pursuance to a conspiracy in any combination between them, corporations or persons, just like natural persons, making the corporation civilly liable for the resulting damages to the same extent as a natural person. National Ass'n. for Advancement of Colored People v. Overstreet, 142 S.E. 2d 816, cert. denied, 384 U.S. 118, rehearing denied 384 U.S. 981 (1965), see also Transportation Co. v. Standard Oil Co., 50 W. Va. 611, 40 S.E. (1902).

The petitioner has also shown the existence of invidious class-based animus that motivated the

conspiracy. Griffin, 403 U.S. at 102. The intent that must be met is not the same as a requirement of specific intent or scienter. Griffin, 403 U.S. at 103 n. 10. It is not enough to allege a discriminatory animus against an individual, Hughes v. Ranger Fuel Corp., F.2d 6 (4th Cir. 1972), or even a discriminatory animus against a class unless the class discrimination can be said to be invidious. See Eg. Lessman v. McCormick, 591 F.2d 605 (10th Cir. 1979).

The underlying principle under a Section 1985(3) suit is the protection of those groups that warrant and require special federal assistance in protecting their federal rights. Race is, of course, the paradigm of a class subject to invidious discrimination. See Eg. Bethel v. Jendoco Construction Corp., 570 F.2d 1168 (3rd Cir. 1978). The Supreme Court has recently stated that "it is a close question whether Section 1985(3) was intended to reach any class-based animus other than animus against Negroes and Republicans. United Broth. of

Carpenters & Joiners v. Scott, 463 U.S. 825 (1983). The petitioner, a black male is a member of the class that requires federal assistance in protecting his civil rights, and because of his race he was deprived of equal protection of the laws by the concerted actions of the respondents in depriving him of his business practice in the past and future.

Facts: Petitioner can show how inter-hospital communications of each hospital extended outward among all three hospitals by the respondents and their meeting places to terminate or limit petitioner's privileges because of race.

II. **Petitioner has sufficiently alleged that the action taken by the respondents were "state action" or one under color of state law, and alieged the existence of a contract right with which the respondents interfered.**

Title 42 USC Section 1981 constitutionally supports in pertinent part that not only by the implementing clause of the 14th and 13th Amendment, but also by the Article I power of Congress over the District of

Columbia and the territories. Martinsen v. Mulaney, 85 F. Supp. 76 (1949). There being no "state action" requirement in the last two sources of congressional power, this section in its application need not be limited to "state action " or "color of law" situations. Runyon v. MacCrary, 427 U.S. 160, later app. 569 F.2d 1294 (CA 4 Va.), cert. denied 99 S.Ct. 160, later app. 569 F.2d 1294 (CA 4 Va.) cert. denied 99 S.Ct. 311 Section 1976). However, if the right claimed to have been infringed upon has its source in the 14th Amendment, it is necessary to show that the state was involved in and affected by such rights.

In Shaare Telfila Congregation v. Cobb, 785 F.2d 523 (4th Cir. 1986), reviewed on other grounds 95 L.ed. 2d 594 (1986), the court held that

> [w]e, however agree with the Third Circuit's [Mahone v. Waddle] interpretation of the 'full and equal benefit' clause of Section 1981 and concluded that state action is required in order to asset a claim under that statue.

Shaare, 785 F.2d at 525-26. See Mahone v. Waddle, 564 F.2d 1018, 1029 (3rd Cir. 1977), cert. denied, 438 U.S. 904 (1978).

Traditionally there was no "state" requirement for the equal benefit and like punishment clause of Section 1981. The Act of 1866 was designed "to prohibit all racial discrimination, whether or not under 'color of law'." See Jones v. Alfred v. Mayer Co., 392 U.S. 409, 436 (1968). The Fourth Circuit in Shaare adopted the position that when a person is alleging a deprivation of the equal benefit clause, state action must be alleged. In making this determination, the Fourth Circuit relied on the decision in Mahone. In Mahone, however, the court stated "in the instant case . . . the complaint does allege state action. We need decide no more in this case." Mahone, 564 F.2d at 1030. Thus, the Mahone's court discussion of state action was unnecessary to the court's conclusion. Moreover, the Mahone court confined its

analysis to the language of the statue without reference to the legislative history of Supreme Court precedent.

The absence of words expressly limiting Section 1981 to official acts of discrimination is an indication that Congress did not intend to restrict the section to such conduct. When Congress has intended to limit the reach of a civil rights statue, it has expressly done so. See Section 1983, 18 USC Section 242 (1948).

The language that is found in Section 1981 originated in the Civil Rights Act of 1866, Act of April 19, 1866, Ch. 31 Section 1, 14 Stat. 27. The impetus behind the Act of 1866 was Congressional concern over, not only official acts of racial discrimination, but purely private injustices as well. These private attacks were clearly viewed as the type of evil the Act of 1866 was designed to prevent. Thus, the only conclusion to be reached is that Congress intended the entire Section 1981 to extend to private acts of discrimination.

Moreover, Section 2 of the 1866 Act provides fines and prison terms for any person acting under color of law to deprive others of rights secured under Section 1. Thus, only official misconduct was a criminal offense under Section 2, and it exempts private acts of discrimination from the criminal sanctions it imposes. The Supreme Court has stated

> [t]here would, of course, have been no private violations to exempt if the only 'right' granted by Section 1 had been a right to be free of discrimination by public officials.

Jones v. Alfred Mayor Co., 409, 425-26 (1968).

The Supreme Court has stated that because of the common origins of Sections 1981 and 1982, these Sections are not to be construed differently. Tilman v. Wheaton-Haven Recreation Ass'n., 410 U.S. 431, 439-40 (1973). The prohibitions of Section 1982 are not confined to official acts of discrimination. Jones v. Alfred Mayor Co., 392 U.S. 409, 436 (1968). Thus, it is of no consequence whether the respondent hospitals are private or public because the equal benefit clause of

Section 1981 prohibits all forms of racial discrimination whether by private individuals or done under color of state law.

The contract prong of 42 USC Section 1981 does not require state action. Mahone v. Waddle, 564 F.2d 1018, 1029 (3rd Cir. 1977). The petitioner had agreements with each respondent hospital. The nature of the agreements were that petitioner would perform medical services as a licensed physician for and at respondent hospitals. In addition, the petitioner held **two separate contracts** from one of the respondent hospitals and was paid an hourly rate to provide these medical services. In Mahone v. Waddle, the court held that

> The right "to make and enforce" contracts necessarily is concerned with relations between private individuals. It is usually with another individual, not the state, that a black person would seek to make a contract; it is that other individual's racially motivated refusal to make a contract which can cause harm to the black person. The right "to make and enforce" can thus be infringed private individuals, and it is appropriate that private individuals be held liable for that infringement."

Mahone, 564 F.2d at 1029. Thus, it is not whether the three respondent hospitals are private or public.

Petitioner has specifically shown that the respondents through its authorized agents interfered with petitioner's contractual right to perform medical services at respondent hospitals. The staff at the respondent hospital did everything within their power because of petitioner's race to ensure that petitioner's contract not be enforced by all respondent hospitals. As a result of the conspiracy against petitioner, his contractual rights with each respondent hospital have not been enforced.

Facts: Payment from these contracts were later given to one or two respondents after limitation or decease of petitioner's privileges, due to racial discrimination.

III. **The petitioner's civil rights claims under both Section 42 USC Section 1981 and Section 1985 are not barred by the applicable statute of limitations as to respondent St. Mary's Hospital, Inc.**

Congress has not specified a limitation period for suits under Sections 1981 or 1985, thus courts apply the

most analogous statue of limitations of the state where the deprivation occurred. The Fourth Circuit has held that the statue of limitations governing personal injury suits will be applied to Section 1981 action. McCrary v. Runyon, 515 F.2d 572 (1987). Further, Section 1985 suits are governed by the same two-year limitation period. See Brady v. Sowers, 453 F. Supp. 52 (W.D. Va. 1978).

The personal injury statue of limitation in Virginia is found at Code of VA 1950, as amended, Section 8.01-243(A) which requires a suit to be filed "within two years after the cause of action accrued." Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), cert. denied, 429 U.S. 920 (1976).

The Virginia statue of limitations does not pose a threat to petitioner's civil rights claims against respondent St. Mary's because the respondent's actions constitute a continuing violation of Sections 1981 and 1985(3). The respondent St. Mary's did not provide the petitioner with

the procedural safeguard that is to be provided to each physician, according to procedures of St. Mary's by-laws.[2] Respondent Sullivan, the hospital administrator, did **not** provide the petitioner with adequate notice that his privileges at St. Mary's were being suspended. **Instead**, respondent Sullivan placed an informal letter under the petitioner's door, informing him that his staff privileges were being terminated.

Thus, the petitioner was not properly notified of the charges pending against him, nor was he provided with a hearing where evidence could be presented and where his attorney could cross-examine witnesses. Instead, petitioner was informally notified of his suspension and given a hearing which was never completed. The respondent St. Mary's, in bad faith, delayed the

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[2]According to St. Mary's by-laws, certain procedures must be followed after a physician has been notified of possible termination of his hospital privileges. The procedures are (1) Notification of charges; (2) hearing to respond to charges; (3) termination/cleared; and (4) appeal to Hospital Board.

proceedings to deprive petitioner of his procedural rights to a fair impartial hearing.

Thus, it is not appropriate to say that the cause of action accrued when the petitioner was notified, but rather the respondent's deprivation of petitioner's rights constituted a continuing violation and thus, the statue has not run.

In the case at bar, petitioner was denied his right to a fair impartial hearing at St. Mary's. By letter dated October 2, 1986, St. Mary's. through its hospital attorney, requested a reconvening of the Executive Committee for Wednesday, October 29, 1986. This meeting, however, never took ~~place be~~cause of cancellation by St. Mary's.

Thus, on October 29, 1986, it became apparent that petitioner would not be provided with the hearing required by St. Mary's by-laws and their inaction to hold a hearing constituted a continuing violation of petitioner's civil rights. See Williams v. Norfold & W. Ry Co., 530 F.2d 539 (4th Cir. 1975). In Williams, the Fourth Circuit

was asked to decide whether civil rights claims under Section 1981 by black employees against the railroad was barred by the two-year statue of limitation period. The employees had retired more than two years before the institution of the suit. The court held that because the employees challenged this continuous discrimination rather than any single discriminatory act, neither the two-year statue of limitations applicable to Section 1981 nor the 180-day limitations of Title VII bars this action. Williams, 530 F.2d at 542.

Other courts have also recognized that a petitioner's claim is not barred by the two-year statue of limitation where continuous discrimination is found. See Eg. Macklin v. Spector Freight Systems, Inc., 156 U.S. App. D.C. 69, 478 F.2d 979, 994 (1973); Cox v. United States Gypsum Co., 409 F.2d 289, 290 (7th Cir. 1969); See Eg. Chung v. Pomona Valley Community Hospital, 667 F.2d 788 (CA 9 1982). Thus, petitioner's civil rights claims are not barred by Virginia's two-year statue of limitations.

Facts: St. Mary's attorney, Carl McAfee (who no longer practices law due to alleged criminal involvements) stalled this case by intentionally changing court scheduled dates on a continuous basis.

It was mentioned that untimely process was served to the Respondents which allowed them to be dismissed. Summary of time sequences reveals the following:

1. **December 23, 1986,** the original Complaint and Summons was filed by the Petitioner.

2. **June 11, 1988,** a timely Second Amended Complaint was filed.

3. **July 11, 1988,** the judge added the respondents back into the case and asked that summons be issued to each of them.

4. **August 8, 1988,** the judge ordered the court's clerk not to serve the process after petitioner's attorney Sa'Ad El-Amin was granted a withdrawal.

5. **September 13, 1988,** the judge ordered a hearing for the petitioner and respondents to argue their side. Also stated within that order was a 30-day limit to serve their process. This was issued after petitioner's attorney, Chester Smith, withdrew on August 12, 1988.

6. **October 7, 1988,** the petitioner accepted all terms of Rule 11 and therefore **specifically requested** respondents to be served. The judge gave each side 15 days to prepare their case. The petitioner is now

representing himself as the court denied further time for preparation by his new attorneys.

7. **October 21, 1988**, petitioner filed and hand delivered his motion to the court. Petitioner also paid the clerk to have copies of the summons made for presentation to the respondents.

8. **October 24, 1988**, petitioner received these copies from the clerk and mailed a copy to each respondent by return certified mail.

9. **October 26, 1988**, the judge ordered that these same respondents, which he placed back into the case on July 11, 1988, be dismissed due to time limitation.

REASONS FOR GRANTING THE WRIT

This is a civil action based upon race discrimination; civil conspiracy to injure the petitioner in his reputation, business and profession; wrongful and unlawful interference with employment; restraint of trade; and breach of contract. Summary of the events and time sequences, taken from court records (in Appendix J), have revealed that this Petitioner, pro se, has not willfully or intentionally delayed in responding to timely responses, but has deliberately and intentionally within the realm of his law knowledge to comply.

SUMMARY

COMES NOW, your petitioner, pro se, and moves this Court for an order allowing his petition to be docketed and set for trial. The petitioner has sufficiently alleged facts to prove conspiracy to deprive (42 USC Section 1985(3)); conspiracy to injure business and profession (Code of VA 1950 as amended, Sections 18.2-499 and 18.2-500); conspiracy of restraint of trade (15 USC Sections 1, 2, 15, 22, and 26); interference with contractual rights (42 USC Section 1981); and breach of contract.

WHEREFORE, this petitioner prays a writ of certiorari be granted so that justice may prevail.

Levester Thompson, M.D., Pro Se

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

Civil Action File No. _____

LEVESTER THOMPSON, *

Plaintiff, *

vs. *

WISE GENERAL HOSPITAL; ST. MARY'S HOSPITAL, INCORPORATED; NORTON COMMUNITY HOSPITAL & LONG TERM CARE FACILITY; O. DAVID BEVINS; DR. MARTY PRINCE, DR. CHARLES FULTON, ANN CHRISTINA SULLIVAN; DR. ISAM ZEBDAH, DR. LIKIT LERSCHLOLARN; DR. THONGDANG BANCHUIN; RUBY SALYER; DR. A. W. NORTH; DR. CHARLES P. MAINE; and DR. R. CARTEGENA, in their official and in their individual capacity. *

SERVE: WISE GENERAL HOSPITAL *
Ruby Salyer *
Dr. A. W. North *
3267 Norton Road *
Wise, Virginia 24273 *

SERVE: SISTER ANN CHRISTINA, *
SMG; Registered Agent for *
St. Mary's Hospital, *
Incorporated, Ann Christina *

Sullivan, Dr. Likit Lerschlolarn, *
and Dr. Thongdang Banchuin, *
Dr. Isam Zebdah, Dr. R. *
Cartegena, and Dr. Charles *
Fulton *
Third Street, N.E. *
Norton, Virginia 24273 *
*
SERVE: O. DAVID BEVINS, *
Registered Agent for Norton *
Community Hospital & Long *
Term Care Facility, O. David *
Bevins, Dr. Marty Prince, and *
Dr. Charles P. Maine *
100 15th Street, N.W. *
Norton, Virginia 24273 *
*
Defendants. *

COMES NOW the Plaintiff, by and through counsel, and in support of his complaint states that:

JURISDICTION AND VENUE

1. This civil action is brought pursuant to the provisions of 42 USCS 1981, and 42 USCS 1985(3), 42 USCS 1986, Jurisdiction of this Court is invoke pursuant to 28 U.S. Code 1331 and 1343.

2. The Defendants conduct business in the Western Judicial District of Virginia and elsewhere; and the Defendants and its employees are engaged in an industry

affecting commerce; and the Defendants are an employer within the meaning of Title 42, 2000(e) et seq.

NATURE OF CLAIM

3. This is a civil action of race discrimination, conspiracy, wrongful and unlawful interference with employment, libel and slander against corporate and individual defendants.

PARTIES

4. The Plaintiff, Levester Thompson, M.D., a black male, is and was at all times pertinent to this action, a resident of Norton, Wise County, Virginia, a licensed practicing physician in Wise County, and was an on-staff physician with privileges with each of the Defendants, Wise General Hospital; St. Mary's Hospital, Incorporated; and Norton Community Hospital & Long Term Care Facility; all in Wise County, Virginia.

5. Defendant O. David Bevins, a white male, is and was at all times pertinent to this action, an administrator of Norton Community Hospital & Long Term Care

Facility and is engaged in the administration of medicine and medical care as a hospital and medical care administrator under the authority and color of State and Federal law and applicable local ordinances and regulations.

6. Defendant Dr. Marty Prince, a white male, is and was at all times pertinent to this action, a physician and is engaged in the administration of medicine and medical care as a hospital physician under the authority and color of State and Federal law and applicable local ordinances and regulations.

7. Defendant Dr. Charles Fulton, a white male, is and was at all times pertinent to this action, a physician and is engaged in the administration of medicine and medical care as a hospital physician under the authority and color of State and Federal law and applicable local ordinances and regulations.

8. Defendant Ann Christina Sullivan, a white female, is and was at all times pertinent to this action, an

administrator of St. Mary's Hospital, Incorporated and is engaged in the administration of medicine and medical care as a hospital and medical care administrator under the authority and color of State and Federal law and applicable local ordinances and regulations.

9. Defendant Dr. Isam Zebdah is and was at all times pertinent to this action, a physician and is engaged in the administration of medicine and medical care as a hospital physician under the authority and color of State and Federal law and applicable local ordinances and regulations.

10. Defendant Dr. Likit Lerschlolarn is and was at all times pertinent to this action, a physician and is engaged in the administration of medicine and medical care as a hospital physician under the authority and color of State and Federal law and applicable local ordinances and regulations.

11. Defendant Dr. Thongdang Banchuin is and was at all times pertinent to this action, a physician and is

engaged in the administration of medicine and medical care as a hospital physician under the authority and color of State and Federal law and applicable local ordinances and regulations.

12. Defendant Ruby Salyer, a white female, is and was at all times pertinent to this action, an administrator of Wise General Hospital and is engaged in the administration of medicine and medical care as a hospital and medical care administrator under the authority and color of State and Federal law and applicable local ordinances and regulations.

13. Defendant Dr. A. W. North, a white male, is and was at all times pertinent to this action, a physician and is engaged in the administration of medicine and medical care as a hospital physician under the authority and color of State and Federal law and applicable local ordinances and regulations.

14. Defendant Dr. Charles P. Maine, a white male, is and was at all times pertinent to this action, a

physician and is engaged in the administration of medicine and medical care as a hospital physician under the authority and color of State and Federal law and applicable local ordinances and regulations.

15. Defendant Dr. R. Cartegena is and was at all times pertinent to this action, a physician and is engaged in the administration of medicine and medical care as a hospital physician under the authority and color of State and Federal law and applicable local ordinances and regulations.

16. Defendants St. Mary's Hospital, Incorporated and Norton Community Hospital & Long Term Care Facility are and were at all times pertinent to this action, public corporations engaged in the administration of medicine and medical care as hospitals under the authority and color of State and Federal law and applicable local ordinances and regulations.

17. Defendant Wise General Hospital is and was at all times pertinent to this action, a public

unincorporated association of Wise County, engaged in the administration of medicine and medical care as a hospital under the authority and color of State and Federal law and applicable local ordinances and regulations.

FACTS

18. Plaintiff at times relevant herein is and was an on-staff family practice physician, with all qualifications and privileges, at Defendants' hospitals, with office space provided by Defendants at their business locations in Wise County.

19. Plaintiff was and is qualified to hold and fill the position of on-staff family practice physician and has as much if not more experience and education than other white on-staff family practice physicians on contract with the Defendants.

20. Plaintiff's service with the Defendants has at all times been satisfactory.

21. Defendants removed, or caused to be removed, terminated, or caused to be terminated, Plaintiff's hospital privileges with defendants' hospitals, disallowing and preventing plaintiff from continuing the practice of his profession as a family practice physician therein.

22. Defendants' actions were solely unfounded and unlawfully based on plaintiff's race. Plaintiff is the only black physician in all of Wise County, and the only black in all of Wise County having privileges at Defendants' hospitals. By defendants unlawful actions, plaintiff has suffered substantial loss of income and has suffered substantial loss of privileges, affecting his practice of his profession and in earning his livelihood.

23. On or about January 1985, Defendants attempted to interfere with Plaintiff's performance as an on-staff family practice physician. Defendants' actions were solely unfounded and based on plaintiff's race. Not only were such actions of Defendants made without lawful warrant, but Plaintiff has always acted and performed in a lawful

manner and has not committed any offense or malfeasance of any kind. Following these actions of the Defendants, Plaintiff was prevented by Defendants from holding privileges and hospital status at the Defendants' hospitals.

24. Defendants false, wrongfully and unlawfully accused Plaintiff of malpractice, and falsely, wrongfully and unlawfully accused or caused Plaintiff to be accused of being a person unfit for the practice of medicine in Wise County, and of holding hospital status in Defendants' hospitals.

25. Defendants wrongfully, unlawfully and without just cause conspired to coerce Plaintiff to renounce his affiliation with area hospitals, to prevent Plaintiff from freely associating with other physicians and patients of the Defendants' hospitals, and to prevent Plaintiff's patients from continuing to be treated by Plaintiff and wrongfully, unlawfully and without legal cause conspired to harm Plaintiff's reputation.

26. On or about January 1986, Defendants did accuse Plaintiff of causing a disturbance and of violating laws and policies. In making the above described and substantially set forth accusation and threat, Defendants used the words: "Dr. Thompson, you are not aware of, and do not know how to practice medicine . . . you are practicing medicine in an unauthorized area and manner; and you are not qualified to hold status in any hospital."

27. Defendants made the above-described accusations against Plaintiff in the presence of others, and also in writing and delivered same to newspapers, other physicians, their secretaries, agents and other people, who, in turn, transmitted and published Defendants' accusations to other persons, and conveyed to the general public that Plaintiff was unfit, which statements made by the Defendants were intended to and did deprive Plaintiff of public confidence and good will, and lowered the reputation of Plaintiff in the opinion of Plaintiff's fellow physicians, patients, community, friends,

and the general public. Defendants' statements were wrongful, unlawful and malicious and mean, and were taken to mean by those hearing and receiving them that Plaintiff was a person of bad reputation who could not be trusted and was not qualified to hold a membership or hospital status.

28. Defendants' actions and statements exposed Plaintiff to public ridicule and embarrassment, hatred and contempt, and tended to deprive Plaintiff of public confidence and injured him, and by reason of the actions and statements of the Defendants, Plaintiff has been disgraced and embarrassed, and his good name tarnished and his character tarnished and blackened; and Plaintiff suffered humiliation and shame in surrounding areas, and in communities, which deprive Plaintiff of his continued right to practice medicine and that Defendants' actions and statements were unprivileged and known by Defendants to be wrongful, unlawful, false and untrue, without regard, or in disregard, for whether or not they

were false and untrue, wantonly and recklessly directed toward Plaintiff, and without his consent or permission.

29. Plaintiff has been subjected, by the above cited acts, to the deprivation of Defendants, under color of law and of the customs and usages of the State of Virginia, of rights, privileges, and immunities secured to him by the Constitution and laws of the United States, particularly his rights to security of person and his right not to be deprived of liberty or property without due process of law, guaranteed by the Fifth and Fourteenth Amendments of the Constitution; his rights reserved or retained under the Ninth and Tenth Amendments to the Constitution; and his right to the equal protection of laws guaranteed under the Fourteenth Amendment to the Constitution.

30. In doing the acts and things hereinabove complained of, Defendants were conspirators engaged in a scheme and conspiracy designed and intended to deny and deprive Plaintiff of rights guaranteed to him

under the Constitution and laws of the United States, as hereinabove enumerated.

31. As a further direct consequence and result of the acts of Defendants hereinabove complained of, Plaintiff was deprived of liberty and property for a substantial period of time; suffered much anxiety and distress while attempting to do business to earn his livelihood; suffered much discomfort and embarrassment, and was required to expend substantial sums of money and of time in traveling to and from the County of Wise, Virginia and in defending himself against the accusations and wrongdoings of the Defendants.

32. Defendants' actions were unlawfully based on Plaintiff's race, were libelous and slanderous, and were an unlawful and unreasonable interference with Plaintiff's right to the practice of his profession in medicine.

33. Plaintiff requests a jury trial.

WHEREFORE, Plaintiff demands judgment:

1. Awarding Plaintiff damages in the amount of $1,000,000.00 (one million dollars);

2. Awarding Plaintiff punitive damages in the amount of $500,000.00 (five hundred thousand dollars);

3. Awarding Plaintiff reasonable costs of this action; and

4. Granting Plaintiff such other and further relief as may be just, including an injunction against further acts of unlawful discrimination by Defendants.

Dated: December 22, 1986

LEVESTER THOMPSON

By Counsel: /s/ Chester L. Smith

CHESTER L. SMITH, ESQ.
402 Luck Avenue, S.W.
P. O. Box 781
Roanoke, Virginia 24004
703/343-4110
Attorney for the Plaintiff

Appendix B

IN CAMERA MATERIAL

The Medical Quality Foundation
The American Board of Medical-Legal Consultants
National Headquarters
104 Elden Street
Herndon, Virginia 22070

Toll Free: 800-336-0332
In Virginia and D.C.: (703) 437-3333

21 September 1987

D. Bruce Shine, Esquire
Suite 201
The R&W Building
433 East Center Street
Kingsport, Tennessee 37660

Re: Levester Thompson, M.D.

Dear Mr. Shine:

We are in receipt of your firm's check, medical records from the St. Mary's Hospital, the Norton Community Hospital, the Wise Appalachian Regional Hospital, and your cover letter with the Statement of Facts concerning your client, Dr. Levester Thompson.

I am a Board-Certified surgeon, fully experienced in the diagnosis and treatment of patients with problems similar to those in this case.

Over the past eleven years, we have reviewed over 14,000 medical files to issue opinions regarding medical malpractice.

Assistant Medical Director, Denis Damian, and I have reviewed the records of Virginia Hammonds, Sandra Dorton, Hershel Powers, Wiletta Maxwell, and William Gillman, in reference to the care provided by your client, Dr. Thompson, and have prepared the following confidential Work Product Report for you at your request.

CASE NUMBER ONE - SANDRA DORTON

Sandra Dorton was admitted to the Wise Appalachian Regional Hospital on 9-23-84, in was felt to be full-term labor in this her third pregnancy. According to the information available, Mrs. Dorton had been pregnant a total of three times and had experienced

one miscarriage at an unspecified time and one live birth some nine years prior to this third pregnancy. Evidently Mrs. Dorton had been seen at the labor and delivery department on the previous evening and had been assessed as experiencing false labor. The current admission was initiated after some two hours of what Mrs. Dorton felt was the onset of contractions that were being experienced every ten minutes and lasting for approximately one minute. She did report having experienced the "bloody show" on the day prior to the admission, but did not report any leakage or rupture of the bag of water. We have no prenatal medical records available, but the admission history and physical indicates that except for a urinary tract infection and the precautionary admission to another hospital to evaluate the patient for the possibility of preeclampsia (which was not found), the gestation had been unremarkable. Mrs. Dorton's prior delivery had been effected vaginally evidently without any difficulties.

The nurse's labor notes indicate Mrs. Dorton was at the Labor Department as of 8:45 a.m., and was admitted to the services of Dr. Thompson. Her expected date of normal delivery was 9-12-84, plus or minus two weeks, and her vital signs were unremarkable. The fetal heart rate was noted to be 138 (normal 120 to 160), and she was described as experiencing contractions every six to eight minutes with a duration of 45 to 60 seconds. Her membranes were intact and there was noted to be a small amount of bloody show. The vaginal exam which was evidently conducted by Nurse Ryan describes cervical dilatation of 4 centimeters with cervical effacement of 70 percent, and the baby's presenting part was felt to be its head. The cervix or opening to the womb must generally dilate to 10 centimeters and efface or thin down to 100 percent prior to a normal vaginal delivery occurring. The time from labor contraction onset to full dilatation is considered the first stage of labor. In a patient who

has delivered before (multipara), the first stage of labor ranges between six to eight hours.

Nurse Ryan indicates that she notified Dr. Thompson of Mrs. Dorton's admission and provided him with information concerning her earlier admission the night before. She indicates that during that earlier admission, evidently the fetal heart rate had experienced some decelerations (the heart rat slowed down), and we have no fetal monitor tracings for evaluation. Nurse Ryan also indicates that Mrs. Dorton was placed on a fetal monitor during this hospitalization, and the fetal heart rate was noted to have a baseline of approximately 140, with what was described as "some variable decelerations." At 11:15 a.m., Nurse Ryan indicates that Mrs. Dorton complained of some pain, and Dr. Thompson was notified and ordered that she receive 10 milligrams of Nubain (a pain killer) by intravenous push. Her contractions at this time was still approximately every six minutes, and the cervical dilatation was noted to be five centimeters.

Some 10 minutes later, Mrs. Dorton complained of feeling the need to push, and a vaginal exam at this time revealed 6 to 7 centimeters of dilatation with descent of the fetal head. Dr. Thompson is noted to have been notified at this and at approximately 12:00 noon, he was physically present at the hospital and examined Mrs. Dorton. Nurse Ryan describes Dr. Thompson finding 7 to 8 centimeters of cervical dilatation, and evidently an attempt to artificially rupture the bag of waters was unsuccessful, which was evidently attributed to the fact that there appeared to be a decreased amount of amniotic fluid. Nurse Ryan also describes the patient as pushing and the appearance of early decelerations which would be decreases of fetal heart at the beginning of uterine contractions. Nurse Ryan goes on to note that at 12:30 p.m., the cervix was felt to be at 9 centimeters of dilatation, the patient was pushing with contractions, and she was moved to the delivery room. Nurse Ryan concludes her notes by indicating that at 2:30 p.m., after

the patient had been pushing for some two years, evidently some late decelerations (slowing down of the fetal heart as the uterine contraction is stopping) were appreciated and a Dr. North was notified of the patient's condition.

Dr. Thompson's progress notes in essence confirm the information provided by Nurse Ryan, and indicate that when he performed his various vaginal examinations and attempted to rupture the membranes after the membranes had been opened, no fluid was returned and an assessment of the infant's position resulted in a determination that he was probably feeling hair. His post delivery note indicates that Mrs. Dorton delivered vaginally a 7 lb. 13 oz. child, with some difficulty. The delivery was effected by Dr. North, who had to utilize mid to low forceps after there had been no progression for some 2 1/2 hours. You should be aware that the second stage of labor consists of full cervical dilatation until the delivery of the child, and in a multipara patient,

up to two hours is considered the normal duration. Dr. Thompson goes on to state that delivery was effected utilizing epidural anesthesia (need into the spinal canal to deliver numbing agents) over an episiotomy (a cut of the vaginal opening to ease the delivery). The delivery of the placenta was also evidently somewhat difficult in that Dr. Thompson felt it was a retained placenta that necessitated general anesthesia and manual delivery by Dr. North. After this was accomplished, the episiotomy was repaired by Dr. Thompson and then the patient was returned to her hospital room.

According to the consultation forms by Dr. North, he indicates that he was notified by the obstetrical nurse that Mrs. Dorton had been in the delivery room for some two hours, but the exact duration of complete dilatation was not personally known. Evidently some late decelerations had been noted, but this was not a consistent finding and was not persistent with each contraction. Dr. North indicates that he felt delivery was

necessary as quickly as possible, therefore, he decided to effect forceps delivery. Dr. North also states that he had some difficulty in determining exactly what position the child's head was in and was unable to effectively assess this until the epidural anesthesia had been instituted. He was then able to determine that the head was in a left occiput transverse position, which means that the infant's head was turned slightly so that its smallest dimensions were not presenting into the birth canal. The application of the forceps allowed some rotation of the head, which then effected the delivery of the child, who was then handed off directly to a neonatalogist (new baby doctor) for care. After effecting the delivery, Dr. North evidently returned care of Mrs. Dorton to Dr. Thompson and left the hospital.

Dr. North was contacted a short time later after he had returned home, evidently by Dr. Murthy, who had apparently been asked by Dr. Thompson to evaluate Mrs. Dorton in an attempt to effect delivery in the placenta.

Dr. North indicates that Dr. Murthy stated the cervix had contracted down and the remains of the umbilical cord appear to have been broken off flush with the cervix. When Dr. North returned to the hospital, he found the findings as described and a manual attempt to remove the placenta with the previous epidural was unsuccessful. It was therefore decided to utilize general anesthesia after which the placenta was delivered manually with ease. As previously stated, after this was effected, Dr. Thompson was again placed in charge of the patient's care and effected the episiotomy repair.

The day after delivery, evidently Mrs. Dorton began to experience some swelling in the vaginal area and Dr. Thompson again asked Dr. North to evaluate the patient, and it was felt that she was suffering from a vulvar hematoma, which is a collection of blood around the vaginal outlet. Dr. North recommended initial observation with conservative treatment modalities consisting of ice, but did feel that very little drainage of

the hematoma would be necessary. After a number of hours, the hematoma did need drainage which was then accomplished, after which a re-repair of the episiotomy was necessitated, and insertion of a drain into the hematoma cavity was effected. According to the information available, Mrs. Dorton did well thereafter and was eventually discharged from the hospital.

In the strictest sense, it would not appear as though ne could say that any obvious deviation of acceptable Standards of Care occurred during Mrs. Dorton's delivery. While it is true that Dr. Thompson was unable to appreciate the position of the fetal head, the records would appear to indicate that as soon as it was realized the second stage of labor was somewhat prolonged, an obstetrical consultation was arranged. It would be of some benefit to do some discovery to determine precisely whose decision it was to arrange the obstetrical consult. The position of the fetal head was evidently difficult even for Dr. North to determine, and while we do not have

any fetal monitor strips to review, evidently Dr. North also felt that there was no clear indications of obvious fetal distress but delivery needed to be effected before such a situation developed.

The problems concerning the retention of the placenta would also appear to need some additional discovery, but such a situation can develop in the absence of any obvious negligence. Mrs. Dorton did receive a reasonable charge of Pitocin, which is a medication used to stimulate uterine contractions that is administered oftentimes following delivery, as in this case after the placenta was delivered. How the umbilical cord became broken would represent the area of discovery since, in general, one should not put traction on the cord to speed the placenta's delivery, but this is oftentimes done. Even if the umbilical cord had not been broken free at the cervix, evidently spontaneous delivery of the placenta still would not have been affected, therefore, it appears

unlikely that the situation would have been substantially altered.

The problems with the development of the hematoma of the vulvar region again cannot, strictly speaking, be said to have occurred secondary to any negligence. The information available concerning Dr. Thompson's repair of the episiotomy is somewhat minimal but appropriate, and, unfortunately, hematomas do develop and on occasion, despite appropriate care additional surgical intervention is necessary to correct the problem.

CASE TWO - VIRGINIA HAMMONDS

Virginia Hammonds was admitted to the Wise Appalachian Regional Hospital on 1-23-85, with what was felt to be the onset of labor contractions, which she was experiencing very five minutes, lasting approximately one minute. This was her third pregnancy, and she had experienced two previous live births. Her estimated date of delivery was 2-10-85, plus or minus two weeks, and she was felt to represent a 38-week gestation (normal

gestation 38 to 42 weeks) and needed to be observed to determine whether or not she was in active labor. She was placed on fetal monitoring and no abnormalities were detected. Her vital signs were stable, the fetal heart tones were within normal limits, her membranes were intact, and her contractions were irregular and mild. Vaginal examination revealed 1 centimeter of cervical dilatation with no obvious effacement, and the fetal head was felt to be down and floating, meaning that it had not engaged into the birth canal. The labor notes by Nurse Reynolds indicate that Dr. Thompson was informed of the patient's condition on a fairly regular basis, and her contractions continued to be irregular and mild. The patient did complain of mild lower abdominal discomfort, but she required no medications for pain. A change of shift occurred at 11:00 a.m., and a Nurse Hubbard continued the assessment of Mrs. Hammond. By 6:00 a.m. the following morning, Nurse Hubbard felt that there was only 2 centimeters of cervical dilatation,

and there had been a small "bloody show". Another change of shift occurred at 7:00 a.m., and Nurse Ryan took over. It was not felt that the patient was experiencing an active labor, and at 9:00 a.m. Dr. Thompson was notified and he was physically present and examining the patient at 10:45 a.m. After his assessment, he determined that Mrs. Hammonds was suffering from false labor and she was advised she could go home. She was also advised to return to the hospital if contractions became regular, her bag of waters ruptured, or if she experienced increasing bloody show.

Mrs. Hammonds was readmitted to the Wise Appalachian Regional Hospital on 2-12-85, after she had experienced what she evidently felt was a rupture of her bag of waters. She was brought to the hospital by an ambulance and arrived at approximately 1:30 p.m. The labor notes by Nurse Ryan designate the condition of the membranes as ruptured, which occurred at 11:10 a.m. Evidently Nurse Ryan felt that on vaginal examination

there was no significant cervical dilatation or effacement, and she notes that the patient stated, "Had gush of clear water at 11:10 a.m." The patient described experiencing no pain and Nurse Ryan appreciated no obvious leakage of fluid. A nitrazine paper test of the vaginal area was negative, which is a means of determining whether the fluids present are consistent with amniotic fluid. Nurse Ryan did note that there was a thick, yellowish vaginal discharge with a slightly foul odor, and Dr. Thompson was notified of Mrs. Hammond's arrival and condition. The labor notes indicate that at 2:00 p.m., contractions were appreciated on the fetal monitor strip as occurring every 3 to 5 minutes, and lasting from 30 to 40 seconds. When these contractions were observed, the patient indicated that she only felt a slight tightening of her abdomen. The fetal heart rate during this time was within normal limits.

Dr. Thompson was physically present at 2:30 p.m., and had the patient moved to the delivery room in order

to conduct a vaginal examination. Evidently he utilized the nitrazine paper during his examination and placed it adjacent to the cervix, which produced a bluish discoloration which is a negative result. Dr. Thompson evidently decided that since the patient was at term and may have experienced a rupture of membranes and contractions had been observed, she should be admitted for continued observation. The plan was to determine whether or not labor augmentation with Pitocin or consideration of a Cesarean section would be necessary. At a slightly later time on this same day, Dr. Thompson requested that Dr. Ingram, an obstetrician, conduct an evaluation. Dr. Ingram evidently appreciated two-finger dilatation with no active labor or any fluid flowing from the cervix. He was also able to determine that the head was floating and did not feel that rupture of the bag of waters had occurred.

A pelvic ultrasound (sound wave study) was accomplished that revealed the fetal gestational age as

38 weeks, plus or minus three weeks, and the volume of amniotic fluid was felt to be adequate. This was accomplished on the second day of this hospitalization, and after gathering this information, it was elected to discharge the patient. Evidently because the weather was somewhat inclement, the patient did not feel that the roads were safe enough to allow her to go home, and she asked that she be allowed to stay in the hospital. While Dr. Thompson had arranged her discharge, he cancelled it and Mrs. Hammond stayed until 2-14-85, at which point she was discharged and again given instructions for outpatient follow-ups and advice concerning when to return to the hospital if membrane ruptures or regular contractions occurred. She was discharged from the hospital and sent home by ambulance.

Mrs. Hammonds was next admitted to the Wise Appalachian Regional Hospital, on 2-22-85, with uterine contractions occurring every 5 minutes and lasting

approximately 1 minute. According to the labor notes by a Nurse Rose, Dr. Thompson had evidently provided Mrs. Hammond's stepmother with sterile gloves and had instructed her on how to assess Mrs. Hammonds' degree of cervical dilatation. It would appear as though the stepmother had some type of medical experience and, on her assessment, she felt that Mrs. Hammonds had some 4 to 5 centimeters of cervical dilatation. Nurse Rose's assessment did confirm 5 centimeters of dilatation with 80 percent effacement. The membranes were felt to be intact, and the fetal head was felt to be at the birth canal. A monitor was applied, and the fetal heart rate was essentially unremarkable. Contractions were somewhat irregular in length and in duration, and Dr. Thompson was notified of the patient's arrival and condition. He was physically present at 10:00 a.m., which was some 45 minutes after the patient's arrival. He performed an artificial rupture of the membranes that produced what was felt to be 3+ meconium stain fluid.

Meconium is the first bowl movement of the baby, and the appearance of meconium stain fluid in some instances can be an indication of fetal distress, but this is not always the case.

Dr. Thompson's progress notes indicate that, with the appearance of the meconium stain fluid, he discussed this finding with a pediatrician, who appears to be Dr. Valrala (?spelling). Evidently, the findings were not felt to represent a potential for any problems with the infant's delivery, and it was elected to allow the labor to proceed.

Mrs. Hammonds developed 9 centimeters of cervical dilatation with the feeling of pressure at 11:25 a.m., and was taken to the delivery room. Dr. Thompson was present and delivery was effected at 11:53 a.m., via spontaneous vaginal delivery. The baby girl's delivery was slightly complicated by the presence of a nuchal cord (the umbilical cord was wrapped around the child's neck once), and this was hurriedly unwrapped, after which fluid was immediately suctioned from the infant's upper

airways, the cord was clamp and cut, after which the baby was passed off to the nurse. The baby was noted to be slightly dusky in color and had a somewhat delayed cry until after she had been plaCed in the crib and care had been provided. Because of the baby's needs, Dr. Thompson had to turn away temporarily from Mrs. Hammonds and after a very short time, the infant's cry occurred, her color improved, and a pediatrician arrived on the scene to care for the infant. Thereafter, Dr. Thompson turned his attention back to Mrs. Hammonds, where spontaneous delivery of the placenta occurred, and repair of the episiotomy was effected.

It would appear as though Mrs. Hammonds was also found to be suffering from a bronchitis, and she was started on antibiotics during this hospitalization. The impression given in the medical records is that Mrs. Hammonds did well, and both she and her infant were discharged from the hospital on 2-28-85.

The medical records provided for this particular case did not indicate that any inappropriate care was provided on the part of Dr. Thompson. When Mrs. Hammonds presented for the first of these three hospitalizations, she obviously felt that she was experiencing the onset of contractions consistent with labor, and it is completely appropriate to hospitalize the patient for observation. After she had been observed for a number of hours, it was determined that she was not in active labor and she was then discharged from the hospital. Her discharge instructions were completely appropriate. When she presented for the second of these hospitalizations, once again it was her impression that she had experienced a rupture of her bag of waters. We have no idea exactly what she experienced, but since she was at term, it was completely appropriate to hospitalize her for evaluation and to arrange obstetrical consultation, which was done. While it is true that a negative nitrazine test will usually rule out rupture of membranes, this is not always the

case. In a patient at term who has experienced a rupture of membranes, the Standard of Care does require hospitalization and observation, and if spontaneous labor progression does not occur, labor is then augmented; or if the situation demands, a Cesarean section is instituted. Since Dr. Thompson's skill and training is evidently that of a family practitioner, it would be completely appropriate for him to arrange obstetrical consultation in order to confirm that augmentation or Cesarean section should be initiated. He naturally would have to defer to the opinion of the consulting obstetrician after that individual's assessment indicated that the membranes had not ruptured, labor was not imminent, and the patient should be allowed to go home and await the onset of actual labor. We were not privy to the weather situation that evidently necessitated an additional day in the hospital, and while this no doubt caused some administrative problems, from the medical standpoint it could not be called inappropriate.

During Mrs. Hammond's final hospitalization, there is no question that she was experiencing spontaneous labor, and it is appropriate to artificially rupture the membranes to speed the process. When meconium stain fluid was observed, Dr. Thompson appropriately asked for an evaluation. One could perhaps argue that it would have been more appropriate to have an obstetrician evaluate the situation, but consulting with a pediatrician cannot be called inappropriate. We were not privy to the discussion held between Dr. Thompson and the pediatrician, and perhaps some discovery concerning that discussion's contents would be appropriate. While strictly speaking, the presence of meconium stain fluid would not necessarily equal fetal distress, in such a situation, one could anticipate some benefit to having a pediatrician present at the delivery to immediately administer any necessary care to the infant should a problem develop. It is unclear whose decision it was not to insist on having a pediatrician present, but the impression we are given

from the medical records is that Dr. Thompson did deliver immediate and evidently appropriate resuscitation to the infant. It was obviously fortunate that Mrs. Hammonds had no problems, since it would have been extremely difficult for Dr. Thompson to administer to both Mrs. Hammonds and her infant, and had such a situation arisen, there is no question that the physical presence of a pediatrician in the delivery room would have been of substantial benefit. Once again, it would appear as though Dr. Thompson took appropriate steps in asking for a pediatric consultation, but some discovery concerning the decisions made during that discussion would appear to be necessary. Both the mother and child did apparently well.

CASE NUMBER THREE - HERSHEL POWERS

Hershel Powers was a 26-year-old white male,who had evidently been seen by Dr. Thompson on October 9, 1984, with complaints of stomach distress. It would appear as though he advised Dr. Thompson that he had

a previous history of ulcers, and treatment at that time consisted of a prescription for Bentyl, a medicine designed to decrease spasms in the stomach, and Mylanta, an over-the-counter antacid. We have no medical records from this office visit.

On November 1, 1984, Mr. Powers was seen in Dr. Thompson's office and, according to the information contained in the records from St. Mary's Hospital, he complained of experiencing a one- to two-day onset of severe lower abdominal pain. The patient complained of two days of constant constipation, and the present abdominal pain was much worse than he had ever experienced. The pain was described as being periumbilical (around the navel) and then gradually descending into both lower quadrants of the abdomen. It had developed rapidly and had been persistent. He denied any urinary discomfort but did note some discoloration of the urine.

Mr. Powers was admitted to the St. Mary's Hospital, and Dr. Thompson conducted a physical examination. Mr. Powers had a temperature of 100, with an elevated pulse and blood pressure. He was described as being in distress and was clutching his abdomen and complaining of severe enough pain to cause him to cry. Dr. Thompson's physical exam indicates that the abdomen was obese and tender to touch. No enlarged organs were appreciated and the pain was felt to be severe on pressing in the groin and bladder area. Dr. Thompson felt that he was able to appreciate tenderness in the region of the kidneys on either side of the back, and while attempting to perform a rectal exam, the patient evidently complained of so much pain that the exam was deferred. Dr. Thompson's impression was that the pain was not in the rectum but was referred from the groin area. Dr. Thompson's provisional diagnosis was acute abdominal pain, rule out recurrent ulcer, probable acute

pyelonephritis, which is a medical term for a kidney infection.

A route abdominal x-ray was ordered, and an assortment of laboratory studies performed as well. A 21,000 white blood cell count (indicating ongoing infection as the normal ranges between 5,000 to 10,000) was appreciated, with a differential revealing 6 percent immature stab. white blood cells. The differential is a way of assessing the various percentages of the white blood cells, and helps the practitioner to determine the severity of an infection. The appearance of immature white blood cells is an indication that the infection has depleted mature cells, and the body is responding to the need for more white blood cells by letting immature cells into the circulation.

We find that a urine analysis was ordered, but the first one that can be detected in the medical records was evidently accomplished the morning after Mr. Power's admission. This does reveal protein and sugar in the

urine, as well as blood and some white blood cells. In the strictest sense, this would not be totally normal for a male, but on the other hand, it would not be precisely consistent with pyelonephritis. The routine abdominal x-ray showed some findings consistent with a localized ileus (cessation of normal bowel motion) in the upper and mid-abdomen, primarily on the left side, without any evidence of bowel obstruction.

Dr. Thompson initiated treatment of the patient with intravenous fluids, antibiotics, and the reasonable administration of pain medications, once he had established what was felt to be his most like diagnosis. Over the next four days, the patient's temperature ranged between 99 and 103, and for the most part his pain subsided. He did develop signs of abdominal distension, but with the passage of a nasogastric tube (a plastic tube through the nose into the stomach to empty the stomach), this abated. On 11-5-84, on re-examination Dr. Thompson was able to appreciate increasing firmness of

the abdomen, and he then requested a surgical consultation through a Dr. Phillips.

The physician's orders clearly document that Dr. Thompson requested Dr. Phillips' evaluation on 11-5, and there is a second request on 11-6 for Dr. Phillips' evaluation. We do find that Dr. Phillips did conduct an evaluation in the early afternoon of the 6th, and at the time of his evaluation, it was his impression that the patient probably had either a ruptured gallbladder or a ruptured appendix. We find that evidently additional studies were ordered and changes were made in the various medications Mr. Powers was receiving. One of the studies ordered was a CAT scan (computer focused and enhanced series of x-rays) of the abdomen that, in essence, confirmed that there was the collection of fluid and alterations in the anatomical contours consistent with intra-abdominal abscess formation. When Dr. Phillips discussed this with Mr. Powers, for reasons that are

unclear, Mr. Powers evidently refused to consider a surgical exploration of the abdomen.

For reasons that are not clear, some 48 hours went by, and the records clearly document that the patient decided against surgery. Evidently he eventually did consent to an abdominal exploration, which was carried out on 11-8-84. On reviewing the operative report, it would appear as though Dr. Phillips felt that the changes in the various antibiotic regimes Mr. Powers had been placed on had been of some benefit, in that over the 48 hours since his last evaluation, the patient's temperature had subsided to some degree. On opening the abdomen, purulence and collections of various other fluids were appreciated immediately, and there was considerable scarring, in essence gluing all of the abdominal contents together. Dr. Phillips was able to locate a dilated appendix that was ruptured in its mid-portion and this was then removed. The abdomen was then copiously irrigated out. Retention sutures were placed, which are

large stitches placed distant from the edges of the wound, which are used to increase the strength of the subsequent closure in a situation such as this. The remainder of Dr. Phillips' of his closure of the wound is somewhat confusing because he first states, "The fascia was then closed with interrupted figure 8 sutures of double zero chromic catgut." And then in the next sentence he goes on to state that, "No sutures were placed in the subcutaneous fat and fascia." He then concludes his discussion of the closure by indicating that the retention sutures were then tied over pieces of rubber to protect the skin, and then the skin was closed with running sutures of 4-0 nylon. There is no note that any drains were placed in the abdomen, and his description of the closure is somewhat confusing, since in this particular situation, many surgeons would place drains in the abdomen and bring them out through separate stab. wounds, although this is not strictly speaking an absolute.

One could also close the fascia, but with an infected abdomen in general the skin would not be closed.

It is obviously at this point in time that the problems in Mr. Powers' care developed. Evidently, Dr. Thompson's feelings concerning this case were that, as a family practitioner, he would have taken a much more peripheral role in the patient's care, especially as it regards management of surgical complications. Mr. Powers did go on to develop the usual sequence of events that occurs following a massive intra-abdominal infection secondary to a viscus rupture. Due to the onset of the peritonitis sepsis, the kidneys went into renal shutdown secondary to acute tubular necrosis, which means the filtering system of the kidney was overloaded with waste products, which caused portions of the filtering system to die. A continuing evaluation accomplished by both Dr. Phillips and Dr. Thompson, as well as multiple other consultants from the renal, pulmonary, and cardiological departments, revealed that multiple pockets of abscesses

developed in various areas of the abdomen but, once again, for reasons that are unclear, evidently Dr. Phillips did not elect to intervene surgically again. Intravenous fluids and antibiotics were continued, and eventually it appears as though the hospital administrator became involved, and ultimately arrangements were made to transfer Mr. Powers to the University of Virginia, in Charlottesville, for ultimate management of his condition.

We have relatively little information from the University Hospital, but it would appear as though Mr. Powers was subjected to hemodialysis, which means a machine was used to filter his blood in place of his failing kidneys, and he was also subjected to an additional surgical exploration of the abdomen in order to remove the various localized pockets of pus, and generally clean out the intra-abdominal cavity.

Given the facts in this case, it would appear as though as a family practitioner, Dr. Thompson would truly have been beyond his depth in attempting to

manage the complications that developed following Dr. Phillips' surgical procedure. While it would appear as though Dr. Thompson should have perhaps considered a surgical evaluation at some time earlier, it would not appear to completely inappropriate to attempt medical management, given the admittedly atypical presentation of Mr. Powers' symptomatology. In addition, it would appear very likely that had a surgical evaluation been conducted earlier on, Mr. Powers would probably have refused a surgical exploration since, when he was evaluated by a surgeon and was told without question that he needed a surgical procedure, he refused to allow this until some two days had gone by. One could anticipate that a surgical evaluation earlier on would have probably faced even more resistance on Mr. Powers' part. It is true that as the initial admitting physician, Dr. Thompson was still the attending physician, the management of such surgical complications would be beyond the scope of a family practitioner and would

more appropriately be deferred to the decisions of the operating surgeon.

CASE NUMBER FOUR - WILETTA MAXWELL

Wiletta Maxwell was an 86-year-old white female, who had evidently been in and out of the Norton Community Hospital a number of times in late 1985 and was then readmitted to that facility on 1-31-86. Her last prior hospitalization had occurred in November 1985, and had culminated in a diagnosis of aspiration pneumonia, which means that the patient sucked in food or gastric contents that caused problems in the lungs. She was also experiencing mild congestive heart failure, which means that the heart was weak and unable to effectively pump the body fluids around. She had evidently done relatively well following her discharge from the hospital in November 1985, until some three weeks prior to her January 1986 admission. At that time, she had begun to experience swelling of the feet, a decrease in activity, loss of appetite, and urinary problems. She was treated as an

outpatient, evidently by Dr. Thompson, with fluid medications and antibiotics. She had improved initially and then a week prior to her January admission, she began to experience episodes of diarrhea and increasing swelling of the legs. The diarrhea was treated with Donnatal, which is a medication that helps control spasms of the intestines, and it would also appear as though one of Mrs. Maxwell's heart medicines (Digoxin) had built up to a slightly toxic level. Dr. Thompson advised that the Digoxin needed to be held for several days and a short time later, a visit by a home health nurse resulted in a determination that Mrs. Maxwell needed additional evaluations. Arrangements had been made for her to be seen in Dr. Thompson's office but instead the family elected to take her directly to the hospital. She was felt to be suffering from dehydration, and the plan was to institute intravenous therapy and conduct an evaluation for her various other health problems.

An assortment of laboratory studies were ordered, and it was noted that there were signs of a mild renal failure (kidney not working well), and additional blood studies consistent with dehydration. Her initial blood sodium was 155 (normal ranging between 134 and 140), and she was also felt to be considerably anemic as well. Dr. Thompson initiated fluid resuscitation with D5W (sugar water) and then proceeded to arrange for consultations by the cardiology and pulmonary departments of the hospital.

Mrs. Maxwell was seen in consultation by a Dr. Prince on 2-2-86, and it was felt that she represented volume depletion and dehydration secondary to poor intake and diarrhea, as well as the possibility of gastrointestinal bleeding. Dr. Prince recommended fluid replacement consisting of D5@, to be administered rapidly over the next eight hours and then decreased gradually to administer sufficient fluids over the next 24 hours to equalize the patient's fluid loss.

A cardiological consult with a Dr. Joshi was also requested and accomplished 2-3-86. It was felt that the patient was suffering from a pre-renal azotemia, which means problems with kidney function, caused by disorders not primarily as a result of an abnormal kidney. Dr. Joshi recommended again fluid replacement, although he did not specify what type of fluid, and consultations as necessary with various specialists and the lab.

Because the patient evidently continued to have some problems with swallowing, Dr. Thompson also arranged a consultation with what would appear to be a gastroenterologist, Dr. Cangcuesta. After evaluating the various preliminary x-rays and the patient, it was decided that the patient needed an endoscopic evaluation, which means a visualizing instrument inserted down into the throat to directly have a look at the esophagus. This was performed and gave an indication that they may be some type of lesion pressing on the esophagus located

further down, and it was elected to recommend gastroscopy and a possible stomach biopsy.

In accordance with those recommendations, Dr. Thompson arranged an evaluation by a Dr. Singh, who would appear to be a surgeon. Dr. Singh confirmed that the patient needed gastroscopy and biopsy, in light of the fact that she was anemic, had an elevated white blood cell count, and had abnormal labs, including at this time a slightly decreased sodium and potassium. Dr. Singh recommended that abnormal labs needed to be corrected and specifically mentions that a sodium of 128 was noted two days prior to his evaluation, which occurred on 2-7-86.

Dr. Thompson had instituted potassium replacement that quickly corrected the patient's abnormality in that regard, and Dr. Singh conducted his gastroscopy and stomach biopsy later in the afternoon of 2-7-86. Dr. Singh's report was dictated on the date of the surgical procedure, and indicates that the esophagus appeared to

be normal but somewhat wide and dilated in some areas. There was a smooth stricture in the lower third of the esophagus but no obvious mass was appreciated. The scope was then passed into the stomach, and it was noted that the mucosal lining of the stomach was somewhat atrophic (had wasted away slightly). A biopsy of the fundal area (the body of the stomach) was accomplished, and the study progressed into the first section of the small bowel (duodenum) which was unremarkable. On removing the scope, air was also suctioned out of the stomach, and it is noted that within two minutes following the completion of the procedure, the patient became very short of breath, turned blue, and required the delivery of oxygen by face mask. Her cyanosis (blueness from lack of oxygen) resolved, and it was elected to transfer her to the intensive care unit for monitoring.

It is at this point in time that the major problems with Mrs. Maxwell's care developed. X-rays taken within

a very short time following this procedure confirmed that there was free air in the intra-abdominal cavity, consistent with a ruptured viscus that eventually was attributed to evidently Dr. Singh's stomach biopsy. We note the intensive care admission orders were written by Dr. Singh and included an order to administer D5W and one-quarter normal saline to the patient. We also find that Dr. Prince also evaluated the patient on the day of her admission to the intensive care unit and did write some orders on that date but did not recommend any changes in the patient's fluid delivery. Throughout the records there are continual references to make Dr. Thompson aware of various lab results ordered by the other assorted physicians making progress notes and physician's orders during this time. On 2-7-86, we do note a sodium of 125, and on 2-9-86, we note a sodium of 119. We also find a note by Dr. Prince, as well as some orders, on that date as well. We do find that evidently at this point in time, it was felt that the patient

was now suffering from hyponatremia (low blood sodium), apparently due to the administration of pre-mixed Aminophylline, which is a breathing medication. By its nature, Aminophylline, when administered by intravenous infusion, must be mixed with bacteriostatic sterile water rather than saline because saline will cause the medication to crystallize. By this point in time, it had evidently been decided that Mrs. Maxwell could not be considered as a surgical candidate and, because of her hyponatremia, the Aminophylline was discontinued and an alternative breathing medicine was substituted. She was also started on full-strength normal saline, and on this same date, evidently Dr. Thompson decided that the patient could be advanced from a full liquid diet to a soft diet as tolerated. This would certainly appear to be at odds with the diagnosis of a ruptured viscus, but on the other hand, the decision not to intervene with surgery to correct the rupture shortly after it had been found, would also seem to be somewhat at odds with good medical

care. It must be admitted, though, that there is a strong likelihood that had surgery been attempted at the age of 86, given Mrs. Maxwell's overall health status, it is very likely she would not have survived that procedure. Additional evaluations were ordered by the various consultants, including Dr. Prince, Dr. Joshi, and Dr. Singh, and it was then requested that the family be consulted regarding the patient's prognosis, in order to determine whether or not heroic efforts should be made to resuscitate Mrs. Maxwell in the event that her vital signs deteriorated. Evidently it was felt that the ruptured viscus had closed spontaneously, therefore strictly speaking, feeding the patient would not technically be inappropriate. The family eventually decided that Mrs. Maxwell should be considered a "No Code", meaning that no heroic efforts should be made to sustain her life should she arrest, and evidently very shortly after this decision was made, Mrs. Maxwell did go into a complete

cardiac standstill and was pronounced dead at 10:13 p.m., on 2-11-86.

The primary point of contention in this case appears to be the hyponatremia and the fluids that were ordered by Dr. Thompson. As has been pointed out above, Dr. Thompson, as a family practitioner, arranged consultations by multiple specialists and evidently did feel that he should defer many of his treatment decisions to the recommendations of the various consultants. While it is true that Dr. Thompson should have realized a patient with a decreased sodium needed full-strength saline rather than quarter-strength saline, the same could be said regarding each of the other consultants whose notes and orders are in the chart and concurrent with Dr. Thompson's. The intricacies of determining whether or not a decreased sodium is truly hyponatremia or due to some other situation, such as fluid load or excessive glucose, can be difficult at times, and evidently Dr. Thompson felt that he should defer such subtle

determinations to the opinions of the various consultants that he appropriately called in to assist him in handling the complex situation that any frail, 86-year-old patient could be expected to have.

The most appropriate point to be raised in this case is the fact that it does not appear as though the patient's demise was brought about by the arguably mismanaged fluid requirements but rather by the ruptured viscus that was actually caused by Dr. Singh, perhaps inadvertently, during the gastroscopy with biopsy of the stomach. It must be admitted that the hyponatremia probably did not help the situation any but, once again, the patient's demise appears to be due to peritonitis from a ruptured viscus, which was not caused by Dr. Thompson. It does not appear as though one could strictly state that Dr. Thompson violated any Standard of Care, although he certainly may have demonstrated some poor judgment in failing to clearly establish what his role in the management of this patient's situation should be.

his operative report on the date of surgery. Anesthesia was conducted under a spinal block, due to Mr. Gilliam's compromised pulmonary status. Upon entering the abdomen, it was noted that the appendix was inflamed and adherent to the sigmoid colon, which is one of the last segments of the colon usually on the left side of the abdomen, just prior to the segment of the colon that makes the rectum. This is a somewhat unusual location for the appendix. Dr. Miranda describes finding there was a small rupture of appendix associated with a fecalith, which is a stone-like concretion of material that collects in the appendix. The rupture had sealed off and was localized, and the procedure as described by Dr. Miranda indicates surgery was carried out completely according to an acceptable Standard of Care. Following the surgical procedure, Dr. Miranda placed two drains into the abdomen, and then closed the wound in layers

without retention sutures. Since this infection was somewhat localized, the use of retention sutures and various other procedures, such as not closing the skin, would not necessarily be required.

Evidently Mr. Gilliam did reasonably well following surgery, although he was admitted to the intensive care unit as a precaution. Unfortunately, he wound opened up on the fifth postoperative day and resulted in some exposure of the internal abdominal contents. The records are not clear as to what happened to Dr. Miranda, but evidently he was unavailable, and Dr. Singh had to take Mr. Gilliam to surgery to do a secondary repair and a loose closure of the wound. Dr. Singh performed his procedure in an appropriate manner, and then he makes notes to the effect that Dr. Miranda should be asked to continue with the follow-up care since he was the original surgeon. Over the next several days, the notes continue to reflect some kind of conflict concerning Dr. Miranda, and eventually Dr. Singh ended

up having to provide continual surgical coverage thereafter. Five days after Dr. Singh's first secondary closure of the wound, another segment opened up resulting in again the visualization of the internal abdominal contents. The wound was again closed in an appropriate manner. Unfortunately, about a week after that closure, another segment of the wound opened, and again a repeat repair was necessary which was carried out in an unremarkable manner. It would appear as though the primary problem with the closure of the wound was associated with Mr. Gilliam's chronic coughing secondary of his lung disease. The problems with the wound would not appear to be a situation that could be attributed to Dr. Thompson's care.

While all of this was in the process of unfolding, it became apparent that the patient was experiencing some type of blood loss, although evidently the site of this blood loss was never clearly determined. This was noted by Dr. Prince on 1-24-86, and it is at this particular point

in the time that evidently some discovery would be necessary to determine the situation concerning Dr. Thompson's presence. On reviewing the medical records, we find no indications that Dr. Thompson wrote an order officially turning the care of Mr. Gilliam over to any physician, although Dr. Singh and Dr. Prince were both writing orders during this time. It was evidently on 1-25-86 that Mr. Gilliam was found in a condition of respiratory arrest with a rapid heart rate that was attributed to the blood loss. He was resuscitated following this event evidently by Dr. Prince, who then wrote a series of orders for continuing care. We then find a note by Dr. Thompson that is dated 1-26-86, that reads: "Appreciate pulmonary and surgery care in my absence . . . ." Clearly, discovery to determine whether Dr. Thompson made any arrangements during his absence and how long this absence was would be in order. There is no question that if a physician becomes unavailable without making arrangements for patient

coverage, a violation of appropriate Standards of Care would have occurred. In Mr. Gilliam's situation, since two major events evidently occurred during this timeframe (marked blood loss and a respiratory arrest), Dr. Thompson's absence without appropriate arrangements for coverage would clearly represent patient abandonment.

Additional problems occurred, such as the development of confusion and mental aberrations in Mr. Gilliam, but Dr. Thompson arranged for a psychiatric assessment that concluded the effects of Mr. Gilliam's illness and his various medications had caused the mental confusion. While it is true that a family practitioner could have also made this determination, it would not be inappropriate to ask for a psychiatric consultant in this situation. It would also appear as though on 2-1-86, Dr. Singh arranged for Mr. Gilliam to have a lung scan, which is a special test to determine whether the blood flow through the lungs is impeded by a blood clot. This

was evidently Dr. Singh's decision, since he had assumed surgical care of the patient, and on reviewing the results of this scan, we find that the radiologist made it clear he did not feel a pulmonary embolism had occurred. Despite this, evidently Dr. Singh elected to initiated Heparin therapy (the so-called blood-thinning medicine), and while there are notes from Dr. Thompson during this time, it would appear as though the decision to institute this therapy was made by Dr. Singh.

Dr. Prince evidently became involved the first day following the institution of Heparin, and made it clear that such therapy was clearly contraindicated in a patient who is suffering from an undiagnosed blood loss and who also had a lung scan that did not reveal findings consistent with a pulmonary emboli. It would appear as though Dr. Prince's recommendation was to discontinue the Heparin, and Dr. Thompson's orders were written to that effect. It would also appear as though there may

have been influence on the part of Mr. Gilliam and his son to discontinue the Heparin as well.

According to the medical records, Mr. Gilliam basically felt that he was improving and wanted to leave the hospital. We find notes from Dr. Thompson to the effect that the patient was advised that diagnostic studies were necessary in an effect to determine where the bleeding was, including a recommendation for gastroscopy. The notes indicate that the patient refused such therapy, and even went so far as to refuse to consent to any additional lab studies as well. Evidently it was decided that since he was essentially improved and feeling well and was refused therapy, it had been decided to allow him to be discharged from the hospital. Unfortunately, several days went by before this could bear arranged because his authorization for the nursing home bed had expired and it was necessary to seek out and secure another placement. This was eventually done,

and Mr. Gilliam was discharged from the hospital in 2-13-86.

As related above, the medical records that we have reviewed concerning Mr. Gilliam would appear to indicate that reasonable care was delivered on the part of Dr. Thompson, except for the issue of his absence apparently from some time on 1-24-86 through 1-26-86. Clearly, some additional discovery is necessary regarding this timeframe to determine what occurred. After very careful, repetitive review of the medical records, we find no indications that any official orders were recorded that designated who would be responsible for Mr. Gilliam's care during this timeframe. So far as the other aspects of patient care, the problems that developed as a result of the surgical problems cannot be attributed to Dr. Thompson since, as a family practitioner, it would completely appropriate for him to defer such treatment decisions to the surgeon in charge.

Conclusion

After reviewing all of the previous cases, while it would appear as though there are some areas of questionable judgment, except for the potential issue of Dr. Thompson's abandonment of Mr. Gilliam, there would not appear to be any clear-cut violations of appropriate Standards of Care applicable to that which should be provided by a family practitioner. It appears clear that Dr. Thompson readily recognizes and acknowledges his limitations as a family practitioner, and in any situations out of the ordinary, he is very quick to call in a consultant for advice. One, of course, could argue that Dr. Thompson should make further efforts to clearly delineate to what extent he will interact with consultants, but those same consultants should be aware that as a family practitioner, strictly speaking, much of the management of a severely ill patient, as many of the previous patients were, is clearly beyond the standard capabilities of a family practitioner.

Based upon the information and records you have provided, it would appear as though except for the potential abandonment of Mr. Gilliam, we find no other clear indications of provable negligence on the part of Dr. Thompson in the various cases reviewed. We will remain available to both you and your client for any further assistance you require and would be open to continued discussion concerning this case, although the review of any additional material would necessitate the submission of appropriate fees according to our current fee schedule.

Every effort has been made to be as clear as possible regarding the issues in your case. This review and report have been limited to the information and documents you have provided. Should you need further clarification relating to the content of this report, please feel free to contact Assistant Medical Director, Denis Damian, or me.

It is not our policy, however, to directly discuss the content of these reports with the individual involved in the litigation.

This report is not intended for discovery, as it is a confidential Work Product Report prepared for you at your request. Neither I nor, Denis Damian would be available to serve as expert witnesses in this case. We have thousands of medical experts presently on our consulting staff who can review the records and will testify in support of their opinions when appropriate.

Thank you for allowing us to be of assistance in reviewing this interesting and complex case.

Sincerely yours,

/s/ H. Barry Jacobs, M.D.

H. Barry Jacobs, M.D.
Medical Director

/s/ Denis Damian

Denis Damian
Assistant Medical Director

October 20, 1988

To Whom It May Concern:

I have previously submitted notarized statements supporting Dr. Levester Thompson's cause of action showing how he was racially discriminated against.

Please be advised that I will repeat and/or rewrite these statements should there be a need to do so.

If any additional information is needed, please advic[s]e.

Respectfully,

/s/ Sandra Dorton Shupe

County of Wise
State of Wise [Virginia]

Acknowledged before me this 20th day of October, 1988. My commission expires 11-3-89.

/s/ Ruth Ann Edens
Notary Public

October 20, 1988

To Whom It May Concern:

I have previously submitted notarized statements supporting Dr. Levester Thompson's cause of action show how he was racially discriminated against.

Please be advised that I will repeat and/or rewrite these statements should there be a need to do so.

Respectfully yours,

/s/ Jimmy Shupe

County of Wise
State of Wise [Virginia]

Acknowledged before me this 20th day of October, 1988. My commission expires 11-3-89.

/s/ Ruth Ann Edens
Notary Public

October 20, 1988

To Whom It May Concern:

I have previously given a notarized statement in support of Dr. Levester Thompson's Cause of Action showing how he was racially discriminated against.

Please be advised that I will repeat or rewrite this statement if needs arise.

If further information is needed, please advise.

Respectfully yours,

/s/ Josephine Ball

/s/ Burley W. Ball

County of Wise
State of Virginia

Acknowledged before me this 20th day of October, 1988. My commission expires 7-17-90.

/s/ Patricia M. Field
Notary Public

Brenda Lawson
P. O. Box 1786
Wise, VA 24293
October 20, 1988

To Whom It May Concern:

I, Brenda Lawson, was a medical secretary in the employment of Dr. Levester Thompson, of Norton, Virginia, from January of 1985 through June of 1986. During this time I had the occasion to transcribe statements of Dr. Thompson's patients as to their treatment at various local hospitals.

The names of those patients are as follows:

Roscoe Livingston
Nada Livingston
Jimmy Shupe
Gloria Dorton
Burley Ball
Josephine Ball
Teresa Stanley
Barbara Adkins
Mary P. Adams

I, being a notary public at the time, transcribed, witnessed, and signed the statements, after the patients had read, stated, they understood and signed the statements.

To the best of my knowledge, the above-mentioned names are correct and the information I have given is true.

Brenda Lawson
/s/ Brenda Lawson

/s/ Mary Eyster Lawson
Notary
My commission expires 10/7/89.

Appendix C

PENN, STUART, ESKRIDGE & JONES
Attorneys at Law
208 E. Main Street
Post Office Box 2288
Abingdon, Virginia 24210

September 30, 1988

PERSONAL AND CONFIDENTIAL

Dr. Levester Thompson
P. O. Box 1267
205 Hicksford Street
Emporia, VA 23847

Re: Levester Thompson v. North Community Hospital & Long Term Care Facility, et al
Civil Action No.: 86-0200-B
PSE&J File No.: 34-64

Dear Dr. Thompson:

As you probably are aware, this firm represents Norton Community Hospital in the above suit which you filed in the United States District Court for the Western District of Virginia at Big Stone Gap. We also represented Drs. Charles Maine, Charles Fulton and Martin Prince during the time they were defendants in the case. Wise General Hospital and the related entities are represented by Elsey Harris of the Mullins, Thomason and Harris firm in Norton. St. Mary's Hospital, Inc. is represented by Stan Barnhill of the Woods, Rogers & Hazlegrove firm of Roanoke,

On January 23, 1987 we served on your former attorneys a responsive pleading which included a Motion for Sanctions, including attorney's fees, on behalf of

Norton Community Hospital, David Bevins, Dr. Maine, Dr. Prince and Dr. Fulton. That Motion for Sanctions is still pending and has not been ruled on by the Court. In addition, following your voluntary dismissal of the case as of David Bevins, Dr. Prince, Dr. Fulton and Dr. Maine in October 1987, on October 26, 1987 we filed an additional Motion for Sanctions, including attorney's fees, on behalf of those defendants. That Motion for Sanctions also is still pending and has not yet been ruled on by the Court.

As you are probably aware, Rule 11 of the Federal Rules of Civil Procedure requires that every pleading be well grounded in fact and be warranted by existing law or by good faith argument for the extension, modification or reversal of existing law. Rule 11 further requires the Court to impose upon a party who violates this rule sanctions, "which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fees."

To-date this firm has incurred fees and expenses of over $14,823.63 in representing Norton Community Hospital, David Bevins, Dr. Prince, Dr. Fulton and Dr. Maine. I am not aware of the exact fees charged by the other two law firms who are defending the case, but I expect that they are in the same general range. In addition, if you persist in prosecuting this unfounded case, the total fees incurred by the defendants will be several times the present total.

We believe that this is an appropriate case for the imposition of Rule 11 sanctions, including attorney's fees, by the Court. As you know, Judge Williams has threatened several times to impose such sanctions in this case, and has indicated that any new attorney in the case should be prepared to assume responsibility for your

pleadings under Rule 11. We do not intend to offer any voluntary settlement in this case, and expect to press our claim for Rule 11 sanctions against you once the defendants have been vindicated.

My purpose in writing this letter is to offer you an opportunity to avoid any further claim for sanctions by the defendants in the case. As you know, this matter is scheduled for argument on the defendants' Motions to Dismiss on October 7, 1988. I am authorized to state on behalf of the defendants I represent, as well as on behalf of St. Mary's Hospital, Inc. and Wise General Hospital, that if you will dismiss this case with prejudice, the defendants will in turn withdraw and dismiss with prejudice their claims against you for sanctions, including attorney's fees and expenses incurred in the defense of the case.

I am willing to prepare the necessary paperwork to document such an agreement. I would appreciate your giving me a call upon your receipt of this letter to let me know whether we can dispose of the case of these terms, or whether we should all prepare for the arguments which are scheduled for October 7th.

I look forward to hearing from you.

With best regards, we are

Very truly yours,

PENN, STUART,
ESKRIDGE & JONES

/s/ Wm. W. Eskridge
By: Wm. W. Eskridge

WWE/jth
cc: Elsey A. Harris, III, Esq.
D. Stan Barnhill, Esq.

Appendix D

SA'AD EL-AMIN AND ASSOCIATES
Attorneys at Law
Specialists in Trial and Appeals
312 West Grace Street
RIchmond, Virginia 23220

(804) 643-0123

June 9, 1988

Ms. Libby Sexton
Deputy Clerk
United States District Court
P. O. Box 490
Big Stone Gap, Virginia 24219

Re: Thompson v. Wise Hospital
Civil Action No. 86-0200-B

Dear Ms. Sexton:

Please find enclosed for filing, Plaintiff's Second Amended Complaint. Plaintiff has filed in a response to defendant's Motion to Dismiss but would prefer that the Court respond to the Plaintiff's Motion to Amend his complaint and add additional defendants before considering the defendant's Motion to Dismiss.

Counsel for Plaintiff will appear for oral argument if the court deems necessary.

Thank you for your anticipated cooperation.

Sincerely,

/s/ Sa'ad El-Amin

Sa'ad El-Amin

SEA/cm

Enclosure: 1

cc: Elsie A. Harris, Esquire
D. Stan Barnhill, Esquire
William W. Eskridge, Esquire
C. Adrian White, P.C.
Williams Roger McCall, Esquire
George W. Wooten, Esquire
John B. Russell, Esquire
Chester L. Smith, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

Civil Action File No. _____

LEVESTER THOMPSON, *

*

Plaintiff, *

*

vs. *

*

WISE GENERAL HOSPITAL; *
ST. MARY'S HOSPITAL, *
INCORPORATED; NORTON *
COMMUNITY HOSPITAL & LONG *
TERM CARE FACILITY; O. DAVID *
BEVINS; DR. MARTY PRINCE, *
DR. CHARLES FULTON, ANN *
CHRISTINA SULLIVAN; DR. ISAM *
ZEBDAH, DR. LIKIT *
LERSCHLOLARN; DR. *
THONGDANG BANCHUIN; RUBY *
SALYER; DR. A. W. NORTH; DR. *
CHARLES P. MAINE; and DR. R. *
CARTEGENA, in their official and in *
their individual capacity. *

SECOND AMENDED COMPLAINT

COMES NOW the plaintiff, Levester Thompson, by his counsel, pursuant to Rules 15(a) and 21, Federal Rules of Civil Procedure, and moves this Court for leave to file his Second Amended Complaint, which states with greater specificity his causes of action against the

defendants; which adds additional causes of action; and, which adds as party defendants the following individual defendants;

O. David Bevins;
Ann Christina Sullivan;
Ruby Salyer;
Martin Prince, M.D.;
Charles Fulton, M.D.;
Isam Zebdah, M.D.;
A. W. North, M.D.;
Charles P. Maine, M.D.; and
R. Cartegena, M.D.

A. JURISDICTION AND VENUE

1. This is a civil action brought pursuant to the provisions of: 15 U.S.C. Sections 1, 2, 15, 22, and 26 (Sherman Antitrust Act); 28 U.S.C. Sections 1331, 1337, and 1343; 42 U.S.C. Sections 1981, 1985(3), and 1988; and, Code of Virginia, 1950, as amended, Section 18.2-499 and 18.2-500.

2. Because the state causes the action which are set forth herein involve a common nucleus of fact, plaintiff invokes the pendent jurisdiction of this Court as to the state causes of action.

3. Each of the defendant were either employed; or, conducted their business within the venue jurisdiction of this Court.

4. The defendant hospitals; their employees as named herein; and, the individual physician defendants were, at all times relevant herein, engaged in an industry affecting commerce.

B. NATURE OF THE CLAIM

5. This is a civil action alleging race discrimination; civil conspiracy to injure plaintiff in his reputation, business, trade, and profession; wrongful and unlawful interference with plaintiff's employment; restraint of trade; and, breach of contract.

C. PARTIES

6. Defendants Marty Prince, M.D.; Charles Fulton, M.D.; A. W. North, M.D.; Charles P. Maine, M.D.; and, R. Cartegena, M.D. are white males who were at all times relevant herein, physicians licensed to practice medicine in the State of Virginia.

7. Defendants Isam Zebdah, M.D. is a foreign born male who was at all times relevant herein, a physician licensed to practice in the State of Virginia.

8. Each of the physician defendants, are, and were at all times relevant herein, engaged in the private practice of medicine in Wise County, Virginia. Like the plaintiff, each defendant physician held on-staff physician privileges with each of the defendant hospitals.

9. Defendant, Wise ARH Hospital, hereinafter referred to as "Wise", is an incorporated, private, not-for-profit corporation. Wise is incorporated in the State of Kentucky and engages in the administration of medicine and medical care in Wise, Wise County, Virginia, and other sites.

10. Defendant, St. Mary's Hospital, Inc., hereinafter referred to as "St. Mary's" is a private, non-stock corporation which at all times relevant herein, was engaged in the administration of medicine and medical care in Wise County, Virginia.

11. Defendant, Norton Community Hospital & Long Term Care Facility, hereinafter referred to as "Norton", is a non-profit corporation organized under the laws of the State of Virginia. Norton was and is engaged in the administration of medicine and medical care in Wise, Wise County, Virginia and operates both a hospital and a nursing home in Norton, Virginia.

12. Defendant, O. David Bevins, is a white male who at all times relevant herein, was employed by Norton as its administrator. Defendant Bevins was appointed to his position as administrator by the governing board of Norton to act on behalf of the governing board in the overall administrative management of the hospital.

13. Defendant, Ann Christina Sullivan, is a white female who at all times relevant herein, was employed by St. Mary's as its administrator. Sullivan was appointed to her position as administrator by the governing board of St. Mary's to act on behalf of the governing board in the overall administrative management of the Hospital.

14. Defendant, Ruby Salyer, is a white female who at all times relevant herein, was employed by wise as its administrator. Salyer was appointed to her position as administrator by the governing board of Wise to act on behalf of the governing board in the overall administrative management of the Hospital.

15. Levester Thompson is a black male, who at all times relevant, was a physician licensed to practice medicine in the State of Virginia. Plaintiff was engaged in the practice of medicine in Wise County, Virginia. He held on-staff physician privileges with each of the defendant hospitals prior to the illegal and discriminatory acts engaged in by the defendants which are more fully set forth herein.

D. FACTS

16. At all times relevant herein, plaintiff was extended on-staff privileges at each of the defendant hospitals, during which time he engaged in family practice medicine.

17. Each of the defendant hospitals leased the plaintiff office space in their respective facilities in which plaintiff received, examined, and treated his patients, most of whom were white.

18. Plaintiff's education, medical training, and experience as a family practice physician were commensurate with the education, medical training, and experience of physicians engaged in family practice medicine; and, who, like the plaintiff, were extended on-staff privileges with the respective defendant hospitals.

19. At all times relevant herein, plaintiff met and continued to meet the minimum qualifications required by each defendant hospital to retain his on-staff privileges.

20. Plaintiff was the only black physician located in Wise County, Virginia and the counties contiguous to Wise County.

(St. Mary's)

21. On or about November 16, 1984, defendant Sullivan, purporting to act in her capacity as administrator for St. Mary's, placed a letter of the same date under the door to plaintiff's medical offices which were located in the St. Mary's facility.

22. In her November 16, 1984 letter, Sullivan informed plaintiff that his on-staff privileges had been suspended because of alleged inadequate medical treatment to one of plaintiff's patients, Hershel L. Powers.

23. In force and effect on November 16, 1984 at St. Mary's were Bylaws, Rules and Regulations for the medical staff which included, among other things, a hearing procedure and appellate review procedures involving decisions made by the Board of Governors or Trustees which adversely affected a physician's appointment to or status as a member of the medical staff or physician privileges.

24. The procedure guaranteed to physicians given privileges at St. Mary's was that they were entitled, upon request, to a hearing before an ad hoc committee of the medical staff. If the hearing does not result in a favorable recommendation, the affected physician can make application for appellate review to the board of trustees which is authorized, pursuant to the Bylaws, to make a final decision on the matter.

25. After receiving Sullivan's November 16, 1984 letter, plaintiff retained an attorney who requested the Hospital to accord to plaintiff the hearing procedures set forth in the Bylaws; namely that plaintiff be granted a hearing before an ad hoc committee with his right to appellate review.

26. Following the request, a "hearing" was arranged for January, 1985. In attendance at that hearing were the following persons: Ann Christina Sullivan; Likit Lerschlolarn, M.D.; an attorney employed by the Hospital; plaintiff's attorney; and, plaintiff.

27. An objection was made by plaintiff's attorney to the composition of the persons attending the "hearing" in that there was not sufficient numbers present to constitute a committee quorum.

28. Notwithstanding the objection of plaintiff's attorney to the "hearing" scheduled and conducted in January, 1985, neither Sullivan nor the defendant hospital made any attempt to comply with the Bylaws by affording plaintiff a hearing as set forth in the Bylaws.

29. The "hearing" which was conducted in January, 1985, did not result in a decision as to whether there was sufficient evidence to support the allegations of inadequate treatment of plaintiff's patient, Hershel L. Powers; despite the fact that several attempts were made by plaintiff's attorney to complete the hearing and have a decision rendered.

30. After a number of unsuccessful attempts to have the matter resolved through a hearing, the hospital's attorney sent a letter to plaintiff's attorney dated October

2, 1986, requesting that the executive committee of St. Mary's reconvene in Norton on October 29, 1986 at 6:00 p.m., "to complete the peer review process".

31. Plaintiff was amenable to the date and time proposed to reconvene the executive committee; however, the meeting did not take place and was, in fact, cancelled by St. Mary's.

32. Since October 2, 1986, St. Mary's has not accorded plaintiff any of the procedures set forth in the Bylaws, regarding hearing and appellate review procedures.

33. Notwithstanding the failure of St. Mary's and its administrator to comply with the hearing and appellate procedure, St. Mary's revoked plaintiff's on-staff privileges. As a result, plaintiff was obliged to close his medical offices at St. Mary's.

34. St. Mary's justification for suspending and permanently removing the plaintiff's on-staff privileges was grounded in plaintiff's treatment of Hershel Powers,

a 26-year-old white male, who was seen by the plaintiff on October 9, 1984 and again on November 1, 1984, where he complained of experiencing severe lower abdominal pain.

35. The plaintiff admitted Powers to St. Mary's. After treating Powers conservatively, plaintiff requested a surgical consultation with Dr. James T. Philips, a white male surgeon, on November 5, 1984.

36. Dr. Phillips conducted an evaluation on November 6, 1984. It was his impression that Powers had either a ruptured gall bladder or a ruptured appendix. Dr. Phillips advised Powers of his diagnosis and recommended exploratory surgery of the abdomen. Dr. Phillips' advice was refused by Powers.

37. Powers continued to refuse surgery until November 8, 1984; on which date Dr. Phillips located a dilated appendix which was ruptured in its midportion and the appendix was removed.

38. Realizing his limited competence in surgical and post surgical matters, plaintiff took a more peripheral role in the care of Powers following his surgery.

39. Powers was experiencing surgical complications including peritonitis sepsis, perineal shutdown of the kidneys which was secondary to an acute tubular necrosis.

40. Power's major post surgical care was given by Dr. Phillips and a number of other consultants from St. Mary's renal, pulmonary and cardiological departments.

41. Despite the fact that Powers was experiencing multiple pockets of abscesses developing in his abdomen, Dr. Phillips, for reasons which have yet to be determined, elected not to intervene surgically and correct the serious problem of infection.

42. After the severe deterioration of Powers, Sullivan in her capacity as Hospital Administrator, arranged for Powers to be transferred to the University of Virginia Hospital in Charlottesville, Virginia, where he was given additional surgical exploration of his abdomen to remove

the localized pockets of pus and to generally clean out the intra-abdominal cavity.

43. Despite the clear mismanagement of Powers by Dr. Phillips, who was primarily responsible for Powers' post surgical care, no action was taken regarding Phillips' on-staff privileges at St. Mary's until plaintiff complained that nothing was done to Phillips.

44. Plaintiff's on-staff privileges were suspended and ultimately terminated at St. Mary's Hospital. Phillips was only given a reprimand by the defendants and continues to enjoy on-staff privileges at each of the defendant hospitals.

45. Prior to the suspension of plaintiff's on-staff privileges at St. Mary's, plaintiff was approached by defendant Zebdah, who is Chairman of Obstetrics and Medicine at St. Mary's, and R. Cartegena, who is Zebdah's partner.

46. Both Zebdah and Cartegena told plaintiff in no uncertain terms that plaintiff was to refer all of his

obstetric consultations with plaintiff's patients to their partnership.

47. Plaintiff became offended by the veiled threat which Zebdah and Cartegena made to limit plaintiff's attitude and discretion in making obstetric consultations with doctors other than Zebdah and Cartegena.

48. Plaintiff did not comply with the "suggestion" of Zebdah and Cartegena. He made obstetric referrals to other physicians.

49. On one occasion, plaintiff referred one of his obstetric patients to the Zebdah-Cartegena partnership. However, Zebdah and Cartegena refused the consultation and informed plaintiff that since he did not heed their initial suggestion that he refer all of his obstetric patients to them, that they were not going to consult on plaintiff's patients on an individual or piecemeal basis.

50. In addition to rejecting plaintiff's offer of obstetric consultation, Zebdah and Cartegena told the plaintiff that they did not want him around.

51. At the time that the suggestion by Zebdah and Cartegena was made, plaintiff enjoyed a healthy and growing family medicine practice.

52. While many of the defendant physicians named in this complaint practiced different sub-specialties than did plaintiff, virtually all of them maintained a family medicine practice in which they examined, diagnosed, and treated patients for medical problems related to family medical practice.

(Wise ARH)

53. Plaintiff maintained privileges in obstetrics at Wise Hospital where he enjoyed a thriving obstetrics practice through Wise Hospital.

54. In 1985, defendant North was the chairman of the Obstetrics Department at Wise. He also engaged in a private medical practice in obstetrics and competed with the plaintiff for obstetrics patients.

55. In 1985, North gave Wise Hospital administrator, Ruby Salyer, an ultimatum, to wit, that if plaintiff

retained his privileges to practice obstetrics at Wise, then he, North, would leave the hospital.

56. On one occasion, in 1985, North threatened the plaintiff, telling him to stop delivering babies. North told plaintiff that if he did not cease his obstetrics practice at Wise, he would personally kick plaintiff out of the obstetrics department.

57. Plaintiff was notified in late 1985 that complaints were being filed against him for inadequate and negligent care of two of his patients, Virginia Hammonds and Sandra Dorton at Wise.

58. The Dorton case involved an admission of Dorton to Wise in September, 1984, for full term labor for a third pregnancy. Mrs. Dorton was admitted to the services of the plaintiff.

59. When plaintiff arrived at the Hospital, he examined Mrs. Dorton. After realizing there were some complications associated with a normal delivery, plaintiff requested and received a consultation from Dr. North.

60. The delivery of Mrs. Dorton's child was accomplished by and through Dr. North who turned the patient over to the plaintiff after he delivered the child.

61. There were problems associated with the delivery of the placenta which caused plaintiff to again notify North. North returned to the Hospital and supervised the delivery of a retained placenta, which he accomplished through general anesthesia of Mrs. Dorton and a manual delivery of the placenta.

62. After North left the delivery room for a second time, he turned the patient over to the plaintiff who performed necessary repairs to Mrs. Dorton.

63. The days after the delivery Mrs. Dorton experienced some vaginal swelling. Plaintiff again requested an evaluation by Dr. North who, after examining the patient, recommended conservative treatment modalities which was followed by the drainage of a hematoma by Dr. North. Mrs. Dorton did well after

this procedure and was eventually discharged from the Hospital.

64. There was no deviation of the acceptable standards of care which occurred during Mrs. Dorton's delivery and her post-obstetric care. In fact, all of the post-obstetric problems which Mrs. Dorton experienced can and do develop in the absence of any negligence.

65. The case of Virginia Hammonds was the second case involving allegations of inadequate and negligent care which was brought to the plaintiff's attention. The facts surrounding the Hammonds' case involved three separate hospitalizations of Mrs. Hammond during a relatively short time span because of false labor and her erroneous assumption that her water bag had ruptured.

66. The plaintiff sought a consultation from a specialist in obstetrics on the second hospitalization of Mrs. Hammond, who recommended that the patient be discharged.

67. On the date on which Mrs. Hammond delivered, February 22, 1985, the allegation was made that there should have been a pediatrician in the delivery room at the time of the delivery of the child because of the appearance of certain clinical indicators which sometimes, but not always, indicate fetal distress.

68. Hospital records reveal that during Hammonds' labor and delivery, plaintiff consulted with a pediatrician regarding the appearance of meconium stain fluid which is the first bowel movement of a fetus. Plaintiff was advised by the pediatrician that their [there] was no potential for any problems with the delivery of the child, after which, plaintiff elected to allow the labor to proceed without the presence of a pediatrician in the delivery room.

69. While there may have been disagreement over preferred options in the management of the delivery of Mrs. Hammonds' child, there was absolutely no deviation of the standards of care by the plaintiff regarding his

treatment of Mrs. Hammonds and the delivery of the Hammonds infant. Both the mother and the infant were discharged in good health from the Hospital three days after the delivery.

70. Despite the paucity of evidence to substantiate that the plaintiff engaged in inadequate or negligent care of Mrs. Hammonds and Mrs. Dorton, a hearing was conducted pursuant to the rules and bylaws of Wise Hospital.

71. The hearing committee recommended against approval of the continuation of the plaintiff's privileges in obstetrics at Wise Hospital. Plaintiff appealed this decision to an ad hoc committee of the Board of Trustees, which appeal was scheduled to be heard on January 3, 1986.

72. Salyer had the authority to select the members of the ad hoc committee. She appointed defendants Cartegena and Zebdah on the ad hoc committee even though she had specific knowledge that both Cartegena

and Zebdah were biased and prejudiced towards the plaintiff and were part of the group who succeeded in causing the illegal suspension and termination of plaintiff's privileges at St. Mary's.

73. Plaintiff strenuously objected to Cartegena and Zebdah being placed on the ad hoc committee. However, Salyer insisted that they remain on the committee, which committee upheld the earlier decision to terminate plaintiff's privileges in obstetrics at Wise.

74. Plaintiff appealed the recommendation of the ad hoc committee to Wise's board of trustees, which met on January 31, 1986.

75. Plaintiff was notified by letter dated February 4, 1986 from Salyer that "it was the decision of the ARH Board of Trustees at its meeting of January 31, 1986, to uphold the recommendation of the ad hoc committee of the Board . . . ."

76. The medical staff bylaws, rules and regulations of Wise provide that the decision of the board of trustees

is a final decision. As a result, plaintiff's privileges in obstetrics at Wise were irrevocably terminated.

(Norton Hospital)

77. Defendants Marty Prince and Charles P. Maine, both of whom are specialists in internal medicine, formed a corporation, "Internal Medicine Association of Southwest Virginia".

78. Prince and Maine competed heavily with the plaintiff for patients, because, although Prince and Maine held themselves out to specialists in internal medicine, the bulk of their patient load involved matters which are traditionally and normally treated by family practitioners.

79. Prince and Maine, who originally located their offices at St. Mary's, decided to move their offices to Norton Hospital.

80. Defendant Bevins, hospital administrator at Norton, is responsible for assigning office space and handling professional tenants who lease office space at Norton Hospital.

81. Without prior notice or consultation with the plaintiff, Bevins informed plaintiff that he would have to move his offices, which were located in the front portion of the Hospital, to a rear building in the hospital complex.

82. After plaintiff moved, Prince and Maine were given plaintiff's vacated offices to set up their practice.

83. On several occasions, plaintiff consulted with Prince who practiced a sub-specialty in pulmonary diseases on patients who were hospitalized at Norton.

84. In an effort to further lessen plaintiff's ability to service patients, Prince and Maine recommended to the Norton medical staff that only those who were board certified in internal medicine and surgery, should be allowed to work in the intensive care unit (ICU).

85. Plaintiff lodged a strenuous objection to this suggestion because, if implemented, it would adversely impact on plaintiff's substantial practice as a family

practice physician, as access to and the ability to treat patients in ICU was necessary and critical.

86. The medical staff ultimately rejected the suggestion by Prince and Maine.

87. Prince and Maine also reviewed several medical charts of ICU patients treated by plaintiff. These charts were obtained when plaintiff consulted with Prince on patients who were hospitalized at Norton.

88. From these records, Prince and Maine brought to the attention of Norton's governing board two cases which they contended showed inadequate or negligent care by the plaintiff.

89. Further efforts were directed towards eliminating plaintiff as a competitor at Norton by Charles Fulton, who headed the family practice department at Norton.

90. Frivolous and unsubstantial charges against the plaintiff were made by Fulton to Norton's board of trustees, in which Fulton claimed that plaintiff had not followed proper and acceptable medical procedures.

91. Hearings were held on Fulton's allegations, which determined that for the most part, the allegations were not substantiated.

92. Yielding to the pressure of Fulton and others who were conspiring to deprive plaintiff of his livelihood, Norton imposed stipulations on plaintiff regarding his practicing in ICU, one of which required plaintiff have a consultation on all ICU admissions and that plaintiff follow the advise of the consultant.

93. On June 12, 1986, an ad hoc committee met at Norton to resolve allegations against the plaintiff for the handling of two patients at Norton, Wiletta Maxwell and William Howard Gilliam.

94. In the first case, Wiletta Maxwell, an 86-year-old white female, was readmitted to Norton on January 31, 1986, after having been in and out of the Hospital since November, 1985. Mrs. Maxwell was admitted to the care of the plaintiff for dehydration, CVA, and respiratory problems.

95. Mrs. Maxwell was seen in consultation with Dr. Prince on February 2, 1986 for depletion, dehydration, and diarrhea, as well as possible gastrointestinal bleeding. Dr. Prince recommended fluid replacement.

96. While in the Hospital, Mrs. Maxwell continued to experience difficulty swallowing. Plaintiff arranged consultation with Dr. Cangeusta, a gastroenterologist who recommended that Mrs. Maxwell have a gastroscopy and possibly a stomach biopsy.

97. In accordance with these recommendations, plaintiff arranged an evaluation with Dr. Singh, an surgeon, who confirmed Dr. Cangeusta's evaluation.

98. Dr. Singh recommended that abnormal labs needed to be corrected. A sodium of 128 was noted two days prior to Singh's evaluation, which occurred on February 7, 1986.

99. Plaintiff instituted potassium replacement that quickly corrected the patient's abnormality. Dr. Singh

conducted his gastroscopy and stomach biopsy later in the afternoon of February 7, 1986.

100. Following the completion of the procedure by Dr. Singh, the patient became very short of breath, turned blue, and required the delivery of oxygen by face mask. Mrs. Maxwell was transferred to intensive care.

101. At this time, major problems developed with Mrs. Maxwell. It was discovered by x-rays taken within a short time following this procedure, that there was free air in the intraabdominal cavity, consistent with a ruptured viscus, which was eventually attributed to Dr. Singh's stomach biopsy.

102. Dr. Prince evaluated the patient on the day of her admission to the intensive care unit and wrote an order for the patient. However, he did not recommend any changes in the patient's fluid delivery.

103. At this point, Mrs. Maxwell was diagnosed as suffering from hyponatremia (low blood sodium) due to the administration of pre-mixed aminophylline, which is

a breathing medication. Because of this, Mrs. Maxwell could not be considered as a surgical candidate.

104. Because of Mrs. Maxwell's hyponatremia, the aminophylline was discontinued and an alternative breathing medicine was substituted.

105. Mrs. Maxwell was started on full strength normal saline, and advanced from a full liquid diet to a soft diet.

106. Mrs. Maxwell went into complete cardiac standstill and was pronounced dead at 10:13 p.m. on February 11, 1986.

107. The demise of the patient was not brought about by fluid requirements; but, rather by the ruptured viscus which was actually caused by Dr. Singh, during the gastroscopy with biopsy of the stomach.

108. Hyponatremia was not the cause of Mrs. Maxwell's demise, but, rather a ruptured viscus, which was not caused by the plaintiff.

109. A second case which alleged inadequate medical treatment involved the treatment of plaintiff's patient, William H. Gilliam. Gilliam was a 71 year old male patient who was admitted on January 8, 1986 and discharged March 1, 1986.

110. Mr. Gilliam was admitted with yellowish expectoration, fever and shortness of breath. He was examined and the surgery, which was performed by Dr. Miranda, was successful.

111. Mr. Gilliam did well after surgery but his wound opened up on the fifth postoperative day and resulted in some exposure of the internal abdominal content.

112. Dr. Singh performed a secondary repair and a loose closure of the wound because Dr. Miranda was not available.

113. Mr. Gilliam's surgical wound continually ruptured primarily because of his chronic coughing, which was secondary to his lung disease.

114. The problems caused by the surgical wound could not be attributed to the plaintiff's care, but was in fact attributed to Dr. Singh's mismanagement of the surgery performed on Gilliam.

115. On January 24, 1986, Dr. Prince noted that the patient was experiencing some type of blood loss, although the site of the blood loss was never clearly determined.

116. Dr. Singh and Dr. Prince were both writing orders for Gilliam during this time.

117. On January 25, 1986, Gilliam was found in a condition of respiratory arrest with a rapid heart rate that was attributed to the blood loss. Gilliam was resuscitated following this event by Dr. Prince.

118. On February 1, 1986, Dr. Singh arranged for Gilliam to have a lung scan to determine whether blood flow through the lungs was impeded by a blood clot.

119. Dr. Singh elected to initiate Heparin therapy (so-called blood-thinning medication), which Dr. Prince

declared was clearly contraindicated in a patient who is suffering from an undiagnosed blood loss and who also had a lung scan that did not reveal findings consistent with a pulmonary embolism.

120. The plaintiff wrote orders to discontinue the Heparin therapy.

121. The plaintiff's care for Mr. Maxwell was reasonable, and the problems that developed during the surgery cannot be attributed to the plaintiff as a family practitioner who deferred such treatment to the surgeon in charge, Dr. Singh.

122. After reviewing these two cases, Norton's ad hoc committee on June 12, 1986, supported a recommendation of the ICU Committee that the plaintiff's admitting privileges to the ICU/CCU be revoked, which recommendation was made to the executive committee of the medical staff.

123. The Executive Committee, after reviewing the recommendations of the ad hoc committee at its regular

meeting on June 23, 1986, recommended to the Board of Trustees that plaintiff be required to have a consultation on all ICU admissions and be required to follow the advice of the consultant.

124. The Board of Trustees, at its regular meeting of July 28, 1986, voted to revoke plaintiff's ICU admitting privileges effective August 1, 1986.

125. Following the August 13, 1986 meeting of the joint conference committee of the board of trustees and medical staff, the board of trustees of Norton Community Hospital reaffirmed its decision that plaintiff's admitting and attending privileges for the ICU be revoked effective August 14, 1986.

126. Neither of the peer review committees or the appellate review committee made and mention of or took any action against Dr. Singh, a physician of Indian extraction, for inadequate or negligent care and treatment of Maxwell or Gilliam despite ample evidence indicating same.

127. As a result of all of the loss of privileges at the defendant hospitals, plaintiff was forced to abandon his medical practice in Norton and relocate both his medical practice and business residence to Emporia, Virginia.

128. Plaintiff has since applied for staff privileges at Greenville Memorial Hospital in Emporia, Virginia. However, because of the adverse action taken by the defendant hospitals, he has been unable to procure full benefits at Greenville Hospital.

COUNT I

(Conspiracy to Deprive)

129. Plaintiff restates and realleges paragraphs 1 through 128 and incorporates them by reference herein.

130. Defendants O. David Bevins; Ann Christina Sullivan; Ruby Salyer; Charles Fulton, M.D.; Isam Zebdah; R. Cartegena, M.D.; Charles P. Maine, M.D.; St. Mary's Hospital; Norton Hospital; and Wise General Hospital all conspired together to deprive plaintiff of his livelihood.

131. Defendants' actions were solely unfounded and, in part, based on plaintiff's race because plaintiff, being the only black male physician in Wise County, and the only black having privileges at defendant hospitals, was unique; in that he was in the eyes of the defendants better able to compete for patients than other non-black physicians.

132. By defendants' unlawful actions, plaintiff has suffered substantial loss of income and privileges, affecting his practice and profession, thus sharply decreasing his earnings and his livelihood.

133. The defendants conspired unlawfully and without just cause to cause the plaintiff to abandon his medical practice because the defendants knew full well that it would be virtually impossible for plaintiff or any other physician to maintain a viable medical practice without having staff privileges at area hospitals, all of which violated 42 U.S.C. Section 1985(3).

COUNT II

(Conspiracy to Injure Business and Profession)

134. Plaintiff restates and realleges paragraphs 1 through 133 and incorporates them by reference herein.

135. Each of the defendants combined, associated, agreed and mutually undertook for the purpose of willfully and maliciously injuring plaintiff in his reputation and profession, to wit, practice of family medicine in Wise County, Virginia.

136. As a result of the combination, association, agreement, and mutual undertaking by the defendants, plaintiff suffered substantial damages in his profession as a family practitioner as his income was caused to be reduced following each suspension and revocation of his staff privileges at the hospitals named in this Second Amended Complaint.

137. After plaintiff was suspended from Norton Hospital, plaintiff found it impossible to practice medicine in Wise County, Virginia because it is

absolutely essential for a physician to have staff privileges at one or more of the hospitals located in Wise County.

138. The acts complained of in Count Two are prohibited pursuant to Virginia law, specifically, Section 18.2-499 and 18.2-500, Code of Virginia, 1950, as amended.

COUNT III

(Conspiracy in Restraint of Trade)

139. Plaintiff restates and realleges paragraphs 1 through 138 and incorporates them by reference herein.

140. As a result of the foregoing, the defendants have violated the antitrust laws of the United States in the following particulars:

A. by conspiring and combining with each other and others who are at this time unnamed; and some who are unknown to the plaintiff to bring false, fraudulent and unsubstantiated charges of inadequate care and negligent treatment to the attention of ad hoc committees of the

defendant hospitals; and in finding cause and justification from these charges to expend and revoke plaintiff's privileges at each of the defendant hospitals;

B. in placing on to plaintiff a standard of care which was not otherwise applied to or enforced against other physicians who consulted with and treated patients of the plaintiff and whose expertise and competence plaintiff reasonably deferred; and

C. in upholding the recommendations of suspension and termination of plaintiff's privileges at the defendant hospitals despite the fact that there was insufficient evidence to conclude that plaintiff deviated from the appropriate standard of care required by the Hospital for physicians to obtain and retain staff privileges.

141. Because of the foregoing violations of the antitrust laws, there was substantial lessening of competition and a substantial impact on interstate commerce resulting from the loss of patients by the plaintiff.

142. Plaintiff has been substantially damaged thereby in his business and property within the meaning of the antitrust laws of the United States.

COUNT IV

(Interference with Contractual Rights)

143. Plaintiff restates and realleges paragraphs 1 through 142 and incorporates them by reference herein.

144. By virtue of the extension by each of the defendant hospitals, staff privileges to the plaintiff, there was created between the plaintiff and each of the defendant hospitals a contract in which was contained, certain covenants and agreements.

145. The defendants, by either initiating false, fraudulent or frivolous charges against the plaintiff,

alleging inadequate or negligent treatment of his patients; or, when the defendant hospitals without just cause or basis, suspended or revoked plaintiff's privileges at each of the hospitals, the defendants jointly and in combination, unlawfully interfered with plaintiff's contractual relations with each of the defendant hospitals in violation of 42 U.S.C. Section 1981.

COUNT V

(Breach of Contract)

146. Plaintiff restates and realleges paragraphs 1 through 145 and incorporates them by reference herein.

147. The bylaws of St. Mary's which provide for both a hearing and a[n] appellate review procedures are binding on St. Mary's. By virtue of the failure of St. Mary's and defendant Ann Christina Sullivan to accord plaintiff the relief and protection set forth in the bylaws, St. Mary's and Ann Christina Sullivan breached a written contract between the plaintiff and St. Mary's Hospital.

148. At no time did the plaintiff waive, excuse, or otherwise exempt St. Mary's or Ann Christina Sullivan from the terms and conditions of the contract.

WHEREFORE, plaintiff prays that judgment be entered against the defendants, jointly and severally as follows:

1. Award plaintiff damages in the amount of $5,000,000.00 in compensatory damages and $5,000,000.00 in punitive damages against the defendants, jointly and severally for the injuries which plaintiff suffered as set forth in Count I of this Second Amended Complaint.
2. Award plaintiff the sum of $5,000,000.00 in compensatory damages and $5,000,000.00 in punitive damages against the defendants, jointly and severally for injuries sustained by the plaintiff as is set forth in Count II of the Second Amended Complaint; and plaintiff further prays that by reason of violation of Section 18.2-499, Code of

Virginia, 1950, as amended, plaintiff prays that this Court treble the compensatory damages which he has sustained; and grant plaintiff his costs incurred in this suit; and, reasonable attorneys' fees.

3. Award plaintiff the sum of $5,000,000.00 in compensatory damages and $5,000,000.00 in punitive damages against the defendants, jointly and severally for his injuries sustained in Count III; and, that any judgment awarded in Count III, be increased by three times the amount of his actual damages so determined, together with his costs and reasonable attorneys' fees as provided by law.

4. That the plaintiff be awarded the sum of $5,000,000.00 in compensatory damages against the defendants, jointly and severally for the injuries sustained by the plaintiff as set forth in Count IV.

5. That the Court award plaintiff compensatory damages in the amount of $5,000,000.00 in compensatory damages, and $5,000,000.00 in punitive damages against the defendants, jointly and severally for the injuries plaintiff sustained in Count V.

6. That plaintiff be awarded his costs and reasonable attorneys' fees pursuant to 42 U.S.C. Section 1988 for the injuries sustained by plaintiff as set forth in Count I of the Second Amended Complaint.

7. That this Court grant plaintiff affirmative injunctive relief in that the defendant hospitals be enjoined and restrained from depriving plaintiff of staff privileges for the cases and for the reasons which were advanced by the defendant hospitals as is more fully set forth in this Second Amended Complaint; and, that plaintiff's privileges at the defendant hospitals be restored, reinstated,

retroactive to the date that said staff privileges were suspended or terminated.

8. That plaintiff have such other and further relief as the Court may deem just and proper.

Respectfully submitted,

Levester Thompson

By /s/ Levester Thompson
By Counsel

Sa'ad El-Amin, Esquire
EL-AMIN & CARR
312 West Grace Street
Richmond, Virginia 23220
(804) 643-0123

Chester L. Smith, Esquire
400 Luck Avenue
P. O. Box 781
Roanoke, Virginia 24004-0781

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 1988, a true and accurate copy of the foregoing Notice of Appearance was mailed to Elsie A. Harris, Esquire, MULLINS, KEVLING-STOUT, THOMPSON & HARRIS, 30 Seventh Street, P. O. Box 1200, Norton,

Virginia 24273; D. Stan Barnhill, esquire, John T. Jesse, Esquire, WOODS, ROGERS & HAZELGROVE, 105 Franklin Road, S.W., P. O. Box 720, Roanoke, Virginia 24004-0720; William W. Eskridge, Esquire, PENN, STUART, ESKRIDGE & HONES, 208 East Main Street, Abingdon, Virginia 24210; C. Adrian White, P.C., 11908 Euclid Avenue, P. O. Box 308, Bristol, Virginia 24201; William Roger McCall, Esquire, 317 Reynolds Aracade Building, P. O. Box 82, Bristol, Virginia 24203; George W. Wooten, Esquire. FOX, WOOTEN & HART, Suite 310, 707 Building, P. O. Box 12247, Roanoke, Virginia 24011; John B. Russell, Esquire, BROWDER, RUSSELL, MORRIS & BUTCHER, Suite 1100, One James Center, 901 East Cary Street, Richmond, Virginia 23219; and Chester L. Smith, Esquire, 400 Luck Avenue, P. O. Box 781, Roanoke, Virginia 24002-0781.

By /s/ Sa'ad El-Amin
Of Counsel

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BIG STONE GAP DIVISION

LEVESTER THOMPSON, M.D.,	)	
	)	
Plaintiff	)	CIVIL ACTION No.
	)	86-0200-B
v.	)	
	)	
WISE GENERAL HOSPITAL,	)	ORDER
et al.,	)	
	)	
Defendants	)	

This case is before the court on the motion of Sa'ad El-Amin, Esquire to withdraw as counsel for the plaintiff in this case. It appearing that the motion was served on the plaintiff on the 29th of July, 1988 and no objections having been filed by the plaintiff, it is **ADJUDGED** and **ORDERED** that the motion is granted and Sa'ad El-Amin, Esquire is removed as counsel of record in this case.

The court directs the Clerk not to issue any process on the unserved defendants until such time as new

counsel is employed and agrees to accept responsibility for the pleadings in this case pursuant to Rule 11 FRCP. The plaintiff is granted 30 days to employ new counsel.

The Clerk shall certify copies of this Order to counsel of record and to the plaintiff.

ENTER: This the 8th day of August, 1988.

/s/ Glen M. Williams
United States District Judge

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BIG STONE GAP DIVISION

Civil Action File No. 86-0200-B

LEVESTER THOMPSON,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	ORDER
	*	
WISE GENERAL HOSPITAL, ET ALS	*	

ORDER

Upon Motion of Chester L. Smith, Esquire, and notice being given to Levester M. Thompson, M.D., and deeming it proper to do so, it is hereby ORDERED that Chester L. Smith, Esquire be removed and deleted as counsel of record to the Plaintiff, Levester M. Thompson, M.D., in this matter.

ENTER: 8/12/88

/s/ Glen M. Williams
Glen Williams
United States District Judge

/s/ Chester L. Smith
Chester L. Smith, Esquire
3426 Brambleton Avenue, S.W.
P. O. Box 21633
Roanoke, Virginia 24018
703/774-7455

Appendix G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BIG STONE GAP DIVISION

LEVESTER THOMPSON, M.D.,	:	
	:	
Plaintiff	:	CIVIL ACTION No. 86-0200-B
v.	:	
	:	
WISE GENERAL HOSPITAL, ST. MARY'S HOSPITAL, INC. and NORTON COMMUNITY HOSPITAL,	:	ORDER
	:	
Defendants	:	

In accordance with a Memorandum Opinion entered this day, the plaintiff's claims are dismissed and the case is stricken from the docket of this court.

The Clerk is directed to send certified copies of this Order to counsel of record.

ENTER: This 23 day of February, 1989.

/s/ Glen M Williams
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BIG STONE GAP DIVISION

LEVESTER THOMPSON, M.D.,	:	
	:	
Plaintiff	:	CIVIL ACTION No. 86-0200-B
v.	:	
	:	
WISE GENERAL HOSPITAL, ST. MARY'S HOSPITAL, INC. and NORTON COMMUNITY HOSPITAL,	:	MEMORANDUM OPINION
	:	
Defendants	:	

The plaintiff, Levester Thompson, M.D., brought suit against the three defendant hospitals after they had terminated his privilege to admit patients. He alleges that they conspired to deprive him of his livelihood in violation of 42 U.S.C. Section 1985(3); conspired to injure him in his business or profession in violation of Va. Code Ann. Sections 18.2-499 and 18.2-500 (1988); conspired in restraint of trade in violation of Sections 1 and 2 of the Sherman Antitrust Act; and that they interfered with his contractual rights in violation of 42

U.S.C. Section 1981. The defendants have moved to dismiss pursuant to Fed. R. Civ. Proc. 12(b)(1) and 12(b)(6).

Although the factual background of the case is not complex, its procedural history is checkered, largely due to Dr. Thompson's frequent changes of counsel and present position before the court as pro se plaintiff,[1] with frequent abandonment then recrudescence of causes of action and parties defendant. Briefly, however, Dr. Thompson filed in December 1986 against the three hospital defendants and eleven individuals (doctors and administrators) associated with the hospitals. The court dismissed the claims against the individuals on motion of Dr. Thompson's then attorney; another attorney subsequently attempted to reassert the claims against the individual defendants, as did Dr. Thompson after he began representing himself. After the last of Dr. Thompson's four attorneys withdrew in a dispute over fees, the court entered an order dated September 13,

1988 granting Dr. Thompson thirty days to obtain service on the individual defendants. When this was not done, the court entered the order dismissing the case against the individuals with prejudice. The case is now before the court on the motions to dismiss filed by the three hospitals.

The gravamen of the complaint is that the defendants conspired to deprive the plaintiff, who is black, of his livelihood by denying him hospital privileges, without which he could not, it is claimed, practice medicine in Wise County, Virginia. The hospitals are all located in Wise County.

Dr. Thompson's Second Amended Complaint alleged that his staff privileges at St. Mary's Hospital in the City of Norton, Virginia, were terminated after complications developed in one of his patients who had been operated on for a ruptured appendix. Dr. Thompson did not perform the operation and alleges that the real culprit was the patient's surgeon, who received only a reprimand

from the hospital and continues to practice there. After his privileges were suspended by letter on November 16, 1984, he was afforded a hearing in January 985 at which two members of St. Mary's administration and its lawyer were present, in addition to Dr. Thompson and his lawyer. The hearing proceeded despite the complaints of Dr. Thompson's lawyer that a quorum was not present. Dr. Thompson alleges that no official decision was ever reached by the panel and that he was denied the opportunity to appeal to the hospital's Board of Trustees, as set out in St. Mary's bylaws.

Dr. Thompson was suspended form his obstetrics practice at Wise Hospital in Wise, Virginia following two incidents late in 1985 which caused the hospital staff to question the adequacy of care he provided during and after the time two of his patients were giving birth. Once again, Dr. Thompson denies that he in any deviated from the applicable standard of care. Nevertheless, the Board of Trustees of Appalachian Regional Healthcare, the

owners of Wise Hospital, voted to terminate his privileges in obstetrics.

The story at the third area hospital, Norton Community, was much the same, with Dr. Thompson losing his privileges in the Intensive Care Unit when one of his patients died after an operation (performed by another doctor) and another patient suffered post-operative complications. In both instances, the plaintiff maintains that the problems were the result of the actions of other doctors involved in the case. Nevertheless, after a full review, an ad hoc committee of the hospital staff recommended that his privileges at the ICU be revoked, which action was confirmed by the hospital's Board of Trustees. The revocation was effective as of August 1, 1986. The Board of Trustees and the medical staff reaffirmed the decision two weeks later.

As a result of the loss of these privileges at the hospitals in the Norton-Wise area, the plaintiff alleges that he was forced to move to Emporia, Virginia, in the

eastern part of the state, to begin his practice anew. He says that as a result of the stain on his record caused by the defendants, however, he has not been able to get full staff privileges at the local hospital.

I.

Count I of the complaint alleges a violation of 42 U.S.C. Section 1985(3), which states, in relevant part, that

> [i]f two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege as a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

The key word in the statute is "conspire". Before a claim under it can be made out, a claim of conspiracy must be "alleged with sufficient specificity and factual support to suggest a 'meeting of the minds'." Deck v. Leftridge, 771 F.2d 1168, 1170 (8th Cir. 1985). Although

the Amended Complaint does specifically allege that "Defendants, with express knowledge of the action of the other Defendants, acting upon such knowledge, engaged in a concerted and conspiratorial effort to deprive Plaintiff, by reason of his race, of his livelihood," the specific factual allegations set out in the complaint provide no support whatever for this legal conclusion. Assuming that everything happened exactly the way the complaint alleges that it did, the most that it has shown is that each hospital, apparently acting independently, terminated Dr. Thompson's privileges for problems that were someone else's fault. Notably, the termination by Wise General came 14 1/2 months after the termination by St. Mary's, and Norton Community terminated Dr. Thompson's ICU privileges more than six months after that, or nearly two years after St. Mary's. A hospital, being an inanimate entity, cannot itself conspire with anyone or anything; some human agency must be involved. There is no indication in the complaint of who,

when, how, or where any doctors, administrators, or other individuals connected with any of the defendants conspired to deprive Dr. Thompson of any rights or privileges. And the timetable of the terminations, spread out over two years, is hardly silent evidence of a conspiracy.

The Supreme Court has stated, in discussing the requirements of Section 1985 claim, that

> the language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-cased invidiously discriminatory animus behind the conspirators' action.

Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).

The plaintiff has not shown any race-based animus behind the terminations, nor that the terminations were in any way connected with each other. To sufficiently allege conspiracies under the Civil Rights Acts

> . . . federal courts have come to insist that the complaint state with specificity the facts that, in the plaintiff's mind, show the existence and scope of the alleged conspiracy. It has long been the law . . . that complaints cannot survive a motion to dismiss the if they contain conclusory

> allegations of conspiracy but do not support their claims with references to material facts.

Slotnick v. Stavinsky, 560 F.2d 31, 33 (1st Cir. 1977) cert. den. 434 U.S. 1077 (1978). Accord Briscoe v. Lahue, 663 F.2d 713, 723 (7th Cir. 1981); affirmed 460 U.S. 325 (1983); Arseneaux v. Roberts, 726 F.2d 1022, 1024 (5th Cir. 1982); Croatan Books, Inc. v. Virginia, 574 F.Supp. 880, 888 (E.D. Va. 1983).

As the complaint makes no reference to material facts, the Section 1985 must be dismissed.

II.

A.

The plaintiff's claim that the defendant hospitals interfered with his contractual rights is based on 42 U.S.C. Section 1981, which states:

> All persons within the jurisdiction of the United States shall have the same right in every state . . . to make and enforce contracts . . . and to the full and equal benefits of all laws . . . as is enjoyed by white citizens.

The two "prongs" of this section are those concerning 1) contracts and 2) equal benefits. The Fourth Circuit

twice has ruled that state action is required to bring an "equal benefits" action. Shaare Tefila Congregation v. Cobb, 785 F.2d 523, 527 (4th Cir. 1986), rev'd in part on other grounds 107 S.Ct. 2019 (1987); Eggleston v. Prince Edward Volunteer Rescue Squad, 569 F.Supp. 344 (E.D. Va. 1983), affirmed 742 F.2d 1448 (4th Cir. 1984).

Defendants maintain that since they are private hospitals there is no element of state action and Dr. Thompson therefore has no case to bring under this clause. As the Third Circuit has pointed out:

> The state, not the individual is the sole source of law, and it is only the state acting through its agents, not the private individuals, which is capable of denying to blacks the full and equal benefit of the law.

Mahone v. Waddle, 564 F.2d 1018, 1029 (3d Cir. 1977), cert. den. 438 U.S. 904 (1978).

Although the plaintiff attempts to distinguish Mahone by claiming that the above quotation is dicta, the endorsement of the view it expresses by the Fourth Circuit in Shaare Tefila is definitely not dicta, and is

therefore binding on this court. Accordingly, the complaint under the "equal benefits" prong of Section 1981 will be dismissed.

B.

The "contract prong" of Section 1981 naturally requires a contractual relation before it can come into play; no state action is of course required. Mahone, 564 F.2d at 1029.

The plaintiff contends that he did have contraCts with the defendants, evidenced by "agreements with each defendant hospitals [sic]. The nature of the agreements were [sic] that plaintiff would perform medical services as a licensed physician for and at defendant hospitals," and then goes on to refer to his "contractual right to perform medical services at defendant hospital[s]."

Since there was no written contract between the parties, the question becomes whether or not the "agreement" Dr. Thompson alleges created a contract for the purposes of Section 1981 action.

First, there is no constitutional right for a physician or surgeon to practice in a public hospital. Hayman v. City of Galveston, 273 U.S. 414, 416-17 (1928). While courts in many states have ruled that any competent physician is entitled to admit his patients into public hospitals and to treat them there, see, e.g., Henderson v. City of Knoxville, 157 Tenn. 477, 9 S.W.2d 697, 698 (1928), the courts are generally powerless to intervene where a private hospital has denied privileges. Id. The Virginia Supreme Court has stated that

> when the trustees of a private hospital, in their sound discretion, exclude a doctor from the use of the facilities of the hospital, the courts are without authority to nullify that discretion by injunctive process. There are no constitutional or statutory rights of the doctor, or of his patients who wish to be treated in the hospital by him, which warrant such interferences.

Medical Center Hospitals v. Terzis, 235 Va. 443, 446, 367 S.E.2d 728, 730 (1988) (quoting Khoury v. Community Medical Hospital, 203 Va. 236, 245, 123 S.E.2d 533, 539 (1962)). See generally Annot., Exclusion of or

Discrimination Against Physician or Surgeon by Hospital, 37 A.L.R.3d 645 (1971).

Although the Virginia Supreme Court, in Khoury and Terzis, twice expressly refused to decide whether contractual rights are created when a physician joins the staff of a hospital, it is not alleged that Dr. Thompson was actually a staff physician; rather, it appears that he was a general family practitioner who was being allowed to treat his patients in the three private hospitals which are defendants here. A holding that a contract would be formed by such an association would be stretching matters considerably, and would also, evidently, be contrary to common law. "At common law, absent a contractual obligation to the contrary, the physician's continued association with a private hospital was within the unfettered discretion of the hospital's administrators. Denial of staff privileges, for whatever reason or no reason at all, constituted no legal wrong." Guilbor v.

Manhattan Eye, Ear & Throat Hospital, 46 N.Y.2d 736, 413 N.Y. S.2d 638; 386 N.E.2d 247 (1978).

Therefore, the court finds that the action of the defendants in allowing Dr. Thompson hospital privileges did not create a contractual association between them. Therefore, the complaint under the contract prong of Section 1981 must also be dismissed.

III.

Dr. Thompson's complaint also alleges a conspiracy in restraint of trade and an attempt to monopolize the violation of Sections 1 and 32 of the Sherman Antitrust Act, 15 U.S.C. Sections 1 and 2,[2] which conspiracy was designed to bring false charges of "inadequate care and negligent treatment" against him in order to provide an excuse for revoking his privileges, and to hold him to a higher standard of care than other doctors.

In reviewing a motion for dismissal under the Sherman Antitrust Act, "a complaint should not be dismissed for failure to state a claim unless it appears

beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In applying this very high standard, of course, the court accepts as true the facts alleged in the amended complaint. See, e.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 222 (1948).

Jurisdiction under the Sherman Act may be obtained by showing either that the activity challenged occurred in interstate commerce, or that, although wholly local in nature, it nevertheless has an effect on interstate commerce. McLain v. Real Estate Board of New Orleans, 444 U.S. 232, 242, (1980); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 202 (1974); Mandeville Island Farms, 334 U.S. at 235-7. The plaintiff alleges that the hospitals are "engaged in an industry affecting commerce," not that the hospitals themselves are "in commerce". Therefore, the issue is whether he has made

out a case that the challenged activity affects interstate commerce. McLain, 444 U.S. at 242.

It is not necessary for the plaintiff to show that the conduct complained of has had an actual effect on interstate commerce; were this the case, "jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect." Id.; United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 225 (n. 59) (1940). The "effect on interstate commerce" is determined not by the scope of the allegedly unlawful conduct but whether "as a matter of practical economics" the activities allegedly infected by the conspiracy "have a not insubstantial effect on interstate commerce." McLain at 246; Hospital Building Co. v. Rex Hospital. Trustees, 425 U.S. 738, 745 (1975); see Goldfarb v. Virginia State Bar, 421 U.S. 773, 784 (n. 11) (1975) ("It is in a practical sense that we must view an effect on interstate commerce.").

Accordingly, although the plaintiff can base antitrust jurisdiction on the broad range of the defendants' activities rather than just those activities that he especially challenges, the alleged effect on interstate commerce still must be more than merely derisory. This approach appears to have been adopted by the First, Second, Seventh, Eighth, and Tenth Circuits. See Cordova & Simonpietri Agency v. Chase Manhattan Bank, 649 F.2d 36, 45 (1st. Cir. 1981); Furlong v. Long Island College Hospital, 710 F.2d 922, 926 (2d Cir. 1983); Seglin v. Esau, 769 F.2d 1274, 1280 (7th Cir. 1985); Hayden v. Bracy, 744 F.2d 1338, 13423 (8th Cir. 1984); Crane v. Intermountain Health Care, Inc., 637 F.2d 715, 722-4 (10th Cir. 1981) (en banc). The Ninth Circuit has taken the view that proving that the defendant had any general interstate business activities will satisfy the requirement for a "nexus" with interstate commerce. Western Waste Services Systems v. Universal Waste

Control, 616 F.2d 1094, 1097 (9th Cir. 1980), cert. den. 449 U.S. 889 (1980).

In the absence of any Fourth Circuit ruling on this issue, the court adopts the approach of the majority of the circuits. As the Eighth Circuit has said, "[t]he reach of the Sherman Act, although expansive, is not without limit." Hayden v. Bracy, 744 F.2d at 1343.

Under this criterion, the plaintiff has fallen far short of alleging facts sufficient to establish Sherman Act jurisdiction. His allegations of an effect on interstate commerce are entirely conclusory: "a substantial lessening of competition and a substantial impact on interstate commerce resulting from the loss of patients by the plaintiff." There is nothing in the complaint to indicate that there are so few doctors in Wise County, Virginia, that the gain or loss of one of them would have a noticeable effect on the amount of competition. Nor is there any particular showing of how the plaintiff's loss of patients would affect interstate commerce. There is

no allegation that a significant number of Dr. Thompson's patients came to him from outside Virginia. And although some circuits have held that an effect on interstate commerce can be found in a denial of privileges case from the loss of Medicare and Medicaid payments (or medical insurance payments), and purchase of out-of-state medical supplies, see e.g., Konik v. Champlain Valley Physicians Hospital Medical Center, 561 F.Supp. 700, 710 (N.D. N.Y. 1983), any effect in this case -- even if it had been alleged, which it was not -- would be de minimis in light of the fact that Dr. Thompson relocated his practice within Virginia.[3]

The language of the Seventh Circuit seems entirely opposite to the situation here:

> Plaintiff apparently believes that Conley [v. Gibson] mandates that any antitrust complaint in which the plaintiff merely alleges that the defendants acted in concert to . . . interfere with plaintiff's employment opportunity is sufficient to withstand a motion to dismiss. But that is not the law of this circuit . . . . In practice, . . . a plaintiff cannot survive a rule 12(b)(6) motion merely by alleging bare legal conclusions while failing to set forth facts that "at least outline or adumbrate" a violation of the Sherman Act.

Seglin v. Esau, 769 F.2d at 1279 (citations omitted).

Finally, there is considerable authority over the years for the proposition that the courts should not allow plaintiffs, by charging conspiracies in restraint of trade, to turn every case into a Sherman Act matter. Craig v. Sun Oil Co., 515 F.2d 221, 223 (10th Cir. 1975) (fraudulent misrepresentation); Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341, 343 (9th Cir. 1969) (misrepresentation); Ace Beer Distributors v. Kohn, Inc., 318 F.2d 283, 286 (6th Cir.), cert. den. 375 U.S. 922 (interference with contract). The basis of Dr. Thompson's action is and has always been racial discrimination; the antitrust counts were sprung on the court and the defendants out of a clear blue sky by the last of the attorneys in his employ. The court has nonetheless given them careful consideration, but notes that in the cases where courts have upheld the bringing of antitrust complaints race has not been at issue. See Konik, 561 F.Supp. at 706; Zamari v. William Beaumont

Hospital, 430 F.Supp. 875 (E.D. Mich. 1971). Since the real issue here is the allegation of racial animus, which the Sherman Act was obviously not intended to address, the court finds the line of cases limiting the practical reach of the Sherman Act to be persuasive. See also Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940) ("courts should interpret [the Sherman Act] in the light of its legislative history and of the particular evils at which the legislation is aimed.")[4]

Therefore, for all of these reasons, the court finds that the plaintiff's antitrust claims must be dismissed for failure to state a claim.

IV.

The only issues remaining are Dr. Thompson's state law claims of business conspiracy and breach of contract. Because his federal claims will be dismissed for failure to state a claim, there is no basis for pendant jurisdiction of the state law claims. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims

are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."); Sigmon v. Poe, 564 F.2d 1093, 1096 (4th Cir. 1977).

An appropriate Order will be entered this day.

The Clerk is directed to send certified copies of this Memorandum Opinion to counsel of record.

ENTER: This 23 day of February 1989.

/s/ Glen M. Williams
Senior United States District Judge

FOOTNOTES

1 At least technically. Although he is not currently represented by counsel, all of the Second Amended Complaint was prepare by a Richmond attorney who was employed by Dr. Thompson until last fall. Dr. Thompson has not prepared any new pleadings, but is relying completely on the attorney-prepared complaint.

2 Although a violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2, is alleged in that part of the Second Amended Complaint designated "Jurisdiction and Venue," the specific count of the complaint alleging antitrust violations refers only to a conspiracy in restraint of trade under Section 1. Therefore, the court deems the Section 2 claim, if there was indeed an intent to allege it, waived.

3 The effect on interstate commerce from Dr. Thompson's relocation cannot, in any case, be entirely laid at the defendant's door. Only St. Mary's terminated his privileges completely; he retained full privileges for everything but the Intensive Care Unit at Norton Community. Therefore, he could still admit his patients into local hospitals for a full range of medical problems, though not necessarily into the hospital of his choice. According to his amended complaint, however, he now practices in an area of the state where he has not been able to obtain full privileges at the local hospital, and presumably this limits his ability to treat patients. These limitations would not have existed had he stayed in the Norton-Wise area. If the flow of commerce into Virginia has been affected, then, much of it can be ascribed to the plaintiff himself.

4 In addition to saying that the complaint should be dismissed on the ground that no restraint on interstate commerce can be shown, defendants urge dismissal on the ground that insufficient facts to prove a cognizable

conspiracy have been alleged by the plaintiff. The cases defendants cite in support of their position are generally Rule 56 summary judgment cases, not Rule 12(b)(1) and (6) motion to dismiss cases. They follow Monsanto Co. v. Spray-Rite Services Corp., 465 U.S. 752 (1984), in which the Supreme Court laid down the proper standard for a party opposing summary judgment: "[T]here must be direct or circumstantial evidence that reasonably tends to prove . . . a conscious commitment to a common scheme designed to achieve a common objective." Id. at 764. Since the interstate commerce issue is dispositive of the Sherman Act Section 1 claims, the conspiracy (or "concerted activity") issue need not be considered further.

Appendix H

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
(UNPUBLISHED)

No. 89-2055

LEVESTER THOMPSON

Plaintiff - Appellant

v.

WISE GENERAL HOSPITAL; NORTON COMMUNITY HOSPITAL AND LONG TERM CARE FACILITY; ST. MARY'S HOSPITAL, INCORPORATED

Defendants - Appellees

and

RUBY SALYER; A.W. NORTH; CHARLES P. MAINE; ISAM ZEBDAH; ROLDOLFO CARTEGENA; O. DAVID BEVINS; MARTY PRINCE; CHARLES FULTON; ANN CHRISTINA SULLIVAN; LIKIT LERSCHLOLARN; THONGDANG BANCHUIN

Defendants

Appeal from the United States District Court for the Western District of Virginia, at Big Stone Gap. Glen M. Williams, Senior District Judge. (C/A No. 86-200-B)

Submitted: November 29, 1989 Decided: January 30, 1990

Before SPROUSE and CHAPMAN, Circuit Judges, and WINTER, Senior Circuit Judge.

Levester Thompson, Appellant Pro Se. Elsey Allen Harris, III, MULLINS, THOMASON & HARRIS; William W. Eskridge; PENN, STUART, ESKRIDGE & JONES; D. Stan Barnhill, WOODS, ROGERS & HAZELGROVE, for Appellees.

PER CURIAM:

Dr. Levester Thompson appeals from the district court's dismissal of his complaint against three hospitals

arising out of the termination of his hospital privileges.[1] Thompson's complaint alleged violations of 42 U.S.C. Section 1981, 42 U.S.C. Section 1985(3), and the Sherman Antitrust Act, and also asserted pendent state claims.

We find ourselves in agreement with the opinion of the district court disposing of these claims, Thompson v. Wise General Hospital, 707 F.Supp. 849 (W.D. Va. 1989), and find Thompson's contentions on appeal without merit. With respect to the Section 1981 claims, we note that they are foreclosed by the Supreme Court's decision in Patterson v. McLean Credit Union, 57 U.S.L.W. 4705 (U.S. June 15, 1989) (No. 87-107), as Thompson has not alleged discrimination in the making or enforcement of a contract within the meaning of that decision.

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[1]We note that the appeal is timely only as to the hospitals and not to individual defendants dismissed by an earlier order, which was made final in accordance with Fed. R. Civ. P. 54(b). See Federal Deposit Insurance Corp. v. Tripati, 769 F.2d 507 (8th Cir. 1985).

Because the facts and arguments are adequately presented in the materials before the Court, we dispense with oral argument. The judgment of the district court is

AFFIRMED

Appendix I

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2055

LEVESTER THOMPSON

Plaintiff - Appellant

v.

WISE GENERAL HOSPITAL;
NORTON COMMUNITY HOSPITAL
AND LONG TERM CARE FACILITY;
ST. MARY'S HOSPITAL, INCORPORATED

Defendants - Appellees

and

RUBY SALYER; A. W. NORTH;
CHARLES P. MAINE; ISAM ZEBDAH;
ROLFOLFO CARTEGENA; O. DAVID
BEVINS; MARTY PRINCE; CHARLES
FULTON; ANN CHRISTINA SULLIVAN;
LIKIT LERSCHLOLARN;
THONGDANG BANCHUIN

Defendants

On Petition for Rehearing with Suggestion for Hearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc was submitted to This Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman with the concurrence of Judge Sprouse and Judge Winter.

For the Court,

John M. Creacen
Clerk

Appendix J

TRANSMITTAL SHEET
(Notice of Appellate Action)

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
AT BIG STONE GAP

Civil Action 86-0200-B

4CCA No. 89-2055
Case Manager: S. Wiley

LEVESTER THOMPSON

v.

WISE GENERAL HOSPITAL, et al.

Notice of Filing: Notice of appeal is enclosed to all parties (except to appellant in civil cases, DOA, docket entries, dist. ct. order, and CJA 20 (if applicable) are enclosed to CCA.

Pleadings: Vols. #1 (one)

/s/ Bernadine H. Stacy Date: April 17, 1989
Signature of Clerk or Deputy

12/23/86: COMPLAINT AND SUMMONS (Ret'd to attorney for service). /bhs

1/5/87 RETURN OF SERVICE (By certified mail) executed upon defts. Banchuin/Fulton/

Lerschlolarn on 12/29/86. All other defts. on 12/24/86. /bhs

1/8/87 NOTICE & ACKNOWLEDGEMENT FOR SERVICE BY MAIL ret'd executed by O. David Bevins, Sister Anne Christina Sullivan and by Norton Community Hospital & Long term Care Facility on 12/29/86. /bhs

1/12/87 NOTICE OF ACKNOWLEDGEMENT OF RECEIPT OF SUMMONS AND COMPLAINT executed upon Dr. R. Cartegena on 1/7/87. /lb

1/12/87 NOTICE AND ACKNOWLEDGEMENT OF RECEIPT OF SUMMONS AND COMPLAINT executed upon Dr. Isam Zebdah on 1/7/87. /lb

1/21/87 MOTION FOR MORE DEFINITE STATEMENT PURSUANT TO RULE 12(e) OF THE RULES OF CIVIL PROCEDURE filed by deft. Wise ARH Hospital. /bhs

1/21/87 MOTION FOR MORE DEFINITE STATEMENT PURSUANT TO RULE 12(e) OF THE RULES OF CIVIL PROCEDURE filed by deft. Dr. A.W. North. /bhs

1/21/87 MOTION FOR MORE DEFINITE STATEMENT PURSUANT TO RULE 12(e) OF THE RULES OF CIVIL PROCEDURE filed by deft. Ruby Salyers, Administrator of Wise ARH General Hospital. /bhs

1/21/87 NOTICE & ACKNOWLEDGEMENT OF RECEIPT OF SUMMONS & COMPLAINT executed by Wise ARH General Hospital on 12/24/86. /bhs

1/26/87 MOTION FOR MORE DEFINITE STATEMENT by defts. Norton Community Hosp.; O. David Bevins; Dr. Marty Prince; Dr. Charles Fulton & Dr. Charles P. Maine: MOTION PURSUANT TO FRCP 11 by defts. for award of expense including attorney's fees. /bhs

2/5/87 LETTER dated 2/4/87 from counsel from pltf. advising response to Motion will be filed. /bhs

2/5/87 MOTION FOR MORE DEFINITE STATEMENT PURSUANT TO RULE 12(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE filed by deft. St. Mary's Hospital. /bhs

2/5/87 MOTION FOR MORE DEFINITE STATEMENT PURSUANT TO RULE 12(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE filed by deft. Sister Anne Christina Sullivan.

2/9/87 NOTICE of Hearing on March 30, 1987, 10:30 a.m., @ BSG, VA on Motions for More Definite Statements. /bhs

2/10/87 NOTICE of hearing set for 3/30/87 at 10:30 a.m. in BSG on M/More Defin. Statement filed by Norton Comm. Hosp., et al. /lb

2/10/87	MOTION IN OPPOSITION TO DEFENDANT'S MOTION FOR MORE DEFINITE STATEMENT filed by pltf. /lb
2/10/87	MOTION IN OPPOSITION TO DEFENDANT'S MOTION FOR MORE DEFINITE STATEMENT filed by pltf. /lb
2/11/87	MOTION FOR MORE DEFINITE STATEMENT PURSUANT TO RULE 12(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE by deft. Zebdah & Cartagena. /bhs
2/11/87	MOTION FOR MORE DEFINITE STATEMENT, filed by Dr. Lerschlolarn. /lb
2/11/87	MOTION FOR MORE DEFINITE STATEMENT, filed by Dr. Bancuin. /lb
2/13/87	MOTION IN OPPOSITION TO DEFENDANTS' MOTION FOR MORE DEFINITE STATEMENT filed by pltf. & directed at Drs. Zibdah and Cartagena.
2/13/87	MOTION IN OPPOSITION TO DEFENDANTS' MOTION FOR MORE DEFINITE STATEMENT filed by pltf. & directed at St. Mary's Hospital and S. Sullivan. /lb
2/13/87	Magistrate Consent Form mailed. /lb
2/13/87	MOTION IN OPPOSITION TO DEFENDANTS' MOTIONS FOR MORE DEFINITE STATEMENT. /bhs

2/18/87	NOTICE of hearing on March 30, 1987, 10:30 a.m. @ BSG. /bhs
3/18/87	NOTICE of hearing on 3/30/87 at 10:30 @ BSG for Order requiring More Definite Statement, etc., filed by Zibdah and Cartagena. /lb
3/19/87	NOTICE OF HEARING on 3/30/87. /bhs
3/26/87	NOTICE of hearing set for 3/30/87 on pltf.'s request for Order denying defts.' M/More Definite STatement, etc. /lb
3/30/87	AFFIDAVIT of Likit Lerschlolarn. /bhs
3/30/87	AFFIDAVIT of Thongdong Banchuin. /bhs
3/30/87	Rec'd BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR MORE DEFINITE STATEMENT. /bhs
3/30/87 10:38 a.m. to 11:58 a.m.	HEARING: Hon. Glen M. Williams, presiding; Bridget Dickert, OCR; L. Brown, Dep. Clerk; pltf. present w/counsel; defts. rep. by counsel; all parties advised court they were ready to proceed on motions. Defts.' attorneys agreed that Wm. Eskridge woud present the motions. Oral arguments were presented by parties. Ct.'s ruling - See Order. Ct. adjourned. Total time: 2 hours. /lb
3/30/87	ORDER ent'd that pltf. shal specify in more definite statement to each deft. in what manner he or it acted under color of state law; pltf. shall state with regard to each deft. whether or not he had an agreement or contract w/said deft., and if so, whether or

not said agreement was in writing or otherwise and the general nature of the agreement; or if there was no agreement between pltf. and particular deft., whether or not deft. acted to violate an agreement between pltf. and any other party to suit, if so, which party, pltf. shall state which defts. committed libel and slander against him and nature of the libel or slander and approximate time frame which this occurred; pltf. shall state which defts. tortiously interferred w/contract and specify which contract said defts. tortiously interferred with; w/regard to conspiracy, pltf. shall state whether or not he contends that there was only one conspiracy or more than one conspiracy, whether or not all of the doctors and hospitals were engaged in the same conspiracy or whether or not there were more than one conspiracy between various doctors and hospitals, and if so, the general nature of the conspiracy. Pltf. granted 60 days from this date to file more definitive statement and none of the defts. are required to file responsive pleadings until said more definite has been filed. Defts. to file their responsive peladings w/20 days after more definite statement has been filed. Copies cert. & rec. in CIV O.B. #33, p. 108. /lb

4/28/87 NOTICE that pltf. dismisses his claims pursuant to 42 U.S.C. Sections 1985 & 1986. /bhs

5/1/87 MORE DEFINITE STATEMENT by pltf. /bhs

5/9/87 ENTRY OF APPEARANCE OF COUNSEL of Donald F. Mason, Jr., Esq., and D. Bruce Shine, Esq. for plt. /lb

5/9/87 PLAINTIFF'S MOTION TO EXTEND THE TIME IN WHICH DEFENDANTS ARE TO ANSWER PLAINTIFF'S "MORE DEFINITE STATEMENT" for up to and including 8-10-87. /lb

5/12/87 ORDER ent'd that defts. shall have up to and including 8-10-87 to respond to pltfs. initial More Definite Statement. If pltf. files amended or supplemental More Definite STatement prior to or on 8-10-87, defts. shall have 20 days from date of filing of such statement to file their responses. Copies cert. & rec. in CIV.O.B. #34, p. 153. /lb

8/11/87 ORDER ent'd that cause is continued pending the entry of Amended Complaint or Bill of Particulars & defts. shall respond to said Amended Complaint w/in 20 days of filing. Copies cert'd & rec'd in CIV.O.B. #5, at page 137. /bhs

8/12/87 MOTION TO EXTEND TIME TO FILE AMENDED COMPLAINT AND/OR SUPPLEMENT MORE DEFINITE STATEMENT. /bhs

8/21/87 ORDER ent'd granting pltf.'s mtn for extension of time to 9-29-87 to amend his complaint or supplement his more definite statement. Copies cert. & rec. in CIV.O.B. #35, p. 154. /lb

10/1/87 MOTION AND NOTICE TO THE COURT of M/Extension of time for pltf. to file

Amended Complaint and/or More Definite Statement from 9-29-87 to 10-9-87. /lb

10/2/87 ORDER ent'd that pltf. is granted to October 9, 1987 to file his Amended Complaint. Copies cert'd & rec'd in CIV.O.B. #36, p. 27.

10/9/87 MORE DEFINITE STATEMENT AND/OR AMENDED COMPLAINT. /bhs

10/14/87 LETTER dtd 10/9/87 to Clerk from D. Mason w/attached Certificate of Service which was not included in their Motion filed 10/9/87.

10/16/87 NOTICE TO COURT OF VOLUNTARY DISMISSAL UNDER RULE 41(a) F.R.C.P.

10/20/87 ORDER ent'd that: O. David Bevins; Dr. Marty Prince, Dr. Charles Fulton; Christiana Sullivan; Dr. Isam Zebdah; Dr. Likit Lerschlolarn; Dr. Thongdang Banchuin; Ruby Salyer; Dr. A. W. North; Dr. Charles P. Maine and Dr. R. Cartegena are hereby dismissed as defts. in this case. Copies cert. & rec. in CIV.O.B. #36, p. 80. /lb

10/22/87 ANSWER OF ST. MARY'S HOSPITAL. /lb

10/27/87 MOTION TO DISMISS by deft. Norton Community Hospital. /bhs

10/27/87 MOTION FOR SANCTIONS. /bhs

10/26/87 OCR Bridget Dickert's stenographic notes of proceedings held 3/30/87 filed in Carton #87-2 in Abingdon Clerk's Office. /bh

10/30/87 MOTION TO DISMISS AND ANSWER TO MORE DEFINITE STATEMENT OR AMENDED COMPLAINT, filed by deft. Wise General Hospital. /lb

2/5/88 AFFIDAVIT of Sister Anne Christina, former Administrator of St. Mary's Hospital. /bhs

2/5/88 Rec'd MEMORANDUM IN SUPPORT OF DEFENDANT ST. MARY'S HOSPITAL MOTION TO DISMISS AND PLEA OF THE STATUTE OF LIMITATIONS. /bhs

2/5/88 ORDER ent'd that plaintiff respond to motions to dismiss and/or plea of the statute of limitations w/in 20 days. Copies cert'd & rec'd in CIV.O.B. #38, at page 20. /bhs

2/16/88 LETTER to court from counsel for Appalachian Regional Health Care, Inc. regarding brief in support of Motions to Dismiss. /bhs

2/25/88 NOTICE TO THE COURT OF WITHDRAWAL OF COUNSEL OF RECORD. /bhs

2/25/88 ORDER ent'd that D. Bruce Shine, Esq. & Donald F. Mason are permitted to withdraw as counsel for pltf. Copies cert'd & rec'd in CIV.O.B. #38, at page 60. /bhs

3/1/88 AFFIDAVIT OF TED LORENZ, JR., filed by Norton. Com., et al., defts.

3/3/88 MOTION FOR EXTENSION OF TIME TO FILE RESPONSE TO DEFENDANTS'

MOTION TO DISMISS & FOR HEARING ON WITHDRAWAL OF COUNSEL. /bhs

3/3/88 NOTICE OF HEARING on 3/18/88, 10:30 a.m. @ BSG. /bhs

3/18/88 NOTICE OF HEARING on mtns set for 3/31/88 at 9:00 am in Abingdon by telephone conference. /lb

4/6/88 ORDER ent'd that pltf. is granted 30 days from 3/31/88 to obtain new counsel. Copies cert'd & rec'd in CIV.O.B. #38, at page 169. /bhs

4/11/88 AFFIDAVIT OF WILLIAM B. WILLIAMSON. /bhs

5/29/88 NOTICE OF APPEARANCE of Sa'ad El-Amin, Esquire as counsel for pltf.

4/10/88 ORDER ent'd that parties respond tot he pending mtns w/30 days. Copies cert. & rec. in CIV.O.B. #39, p. 20. /lb

6/10/88 Rec'd PLAINTIFF MEMORANDUM IN RESPONSE TO DEFENDANTS MOTION TO DISMISS. /lb

6/10/88 MOTION TO AMEND PLAINTIFF'S COMPLAINT. 1/b

6/10/88 Rec'd MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT TO ADD PARTY DEFENDANTS. /lb

6/10/88 MOTION BY PLAINTIFF TO ADD DEFENDANTS. /lb

7/11/88 ORDER ent'd allowing second amended complaint to be filed. Old defts. are granted 20 days from this day to respond. New defts. allowed 20 days from date of service to respond. Counsel for pltf. directed to provide appropriate number of copies of second amended complaint and summonses to clerk to be marked "Filed" and summonses to be prepared for service. Copies cert. & rec. in CIV.O.B. #39, p. 166. /lb

7/11/88 SECOND AMENDED COMPLAINT. /lb

7/29/88 ST. MARY'S HOSPITAL'S MOTION TO DISMISS & ANSWER TO PLAINTIFF'S SECOND AMENDED COMPLAINT. /bhs

8/1/88 MOTION TO WITHDRAW by Sa'ad El-Amin as counsel for pltf. /bhs

8/1/88 MOTION TO DISMISS & ANSWER by deft. Appalachian Health Care, Inc. /bhs

8/1/88 MOTIONS TO DISMISS, filed by Norton Communty Hospital. /lb

8/8/88 ORDER ent'd that Motion of Sa'ad El-Amin to withdraw as counsel for pltf. is granted; Clerk directed not to issue process on the unserved defendants until such time as new counsel is employed and agrees to accept responsibility for the pleading. Pltf. is granted 30 days to employ new counsel. Copies cert'd & rec'd in CIV.O.B. #40, at page 41. /bhs

8/10/88 MOTION FOR LEAVE TO WITHDRAW as counsel for pltf. by Chester Smith.

8/12/88 ORDER ent'd that Chester L. Smith, Esq. be removed and deleted as counsel of record to plaintiff, Levester M. Thompson, M.D. in this matter. Copies cert. & rec. in CIV.O.B. #40, p. 56. /lb

9/13/88 ORDER ent'd that pltf. is granted 30 days in which to obtain service of process on new parties; court will hear pending Motions to Dismiss on October 7, 1988 at 9:30 a.m. in BSG. Copies cert'd & rec'd in CIV.O.B. #40, page 135. /bhs

9/19/88 SERVICE of copy of Order ent'd 9/13/88 returned executed upon Dr. Thompson on 9/16/88. /bhs

10/7/88 HEARING ON MOTIONS: Hon. Glen M. Williams, presiding; B. Dickert, Parties present for hearing on Motions to Dismiss; Argument presented by counsel for defts.; Pltf. presented argument; court take motions under advisement & parties granted 15 days to furnish any addition authority in support or opposition to Motions. Ct. adjourned. (10:10 AM to 11:20 AM; 1.10 hrs.)

10/19/88 MOTION by pltf. that court subpoena Sa'Ad El-Amin regarding records & documents belonging to pltf. /bhs
(Copies forwarded to counsel for defts. by Clerk.) /bhs

10/21/88 Rec'd letter brief dtd 10/20/88 of LEGAL ARGUMENT AND AUTHORITIES IN

SUPPORT OF DEFENDANTS' PENDING MOTIONS. /lb

10/21/88 NOTICE OF APPEARANCE of pltf. /lb

10/21/88 Rec'd PLAINTIFF'S MEMORANDUM IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS. /lb

10/21/88 SECOND AMENDED COMPLAINT, filed by pltf. /lb

10/21/88 MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT AND TO ADD PARTY DEFENDANTS, filed by pltf.

10/21/88 MOTION TO ADD DEFENDANTS. /lb

10/21/88 MATERIAL FOR IN CAMERA INSPECTION (placed in security cabinet in vault). /lb

10/24/88 SUMMONSES for new additional defts. issued this date and forw'd to pltf. for service. /lb

10/21/88 AFFIDAVIT OF CHARLES FULTON, M.D. /lb

10/21/88 AFFIDAVIT OF CHARLES P. MAINE, M.D. /lb

10/21/88 AFFIDAVIT OF MARTY PRINCE, M.D. /lb

10/21/88 PLEA OF STATUTE OF LIMITATIONS, filed by Norton Community. /lb

10/26/88 Rec'd MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COUNT II OF THE SECOND AMENDED COMPLAINT, filed by Norton Community Hospital (letter attached indicates St. Mary's Hospital and Wise General plan to adopt this in support of their position as to Ct. II. Norton Community Hospital adopts arguments being made by St. Mary's Hospital as to Cts. I, III and IV. No Memorandum will be filed as to Ct. V by Norton Community.)

10/26/88 ORDER ent'd by Order ent'd on 9/13/88, Ct. directed pltf. to obtain service on individual defts. w/30 days or case will be dismissed w/prejudice as to individual defts. More than 30 days have elapsed since date of such order and no service of process on individual defts.; this action is dismissed w/prejudice as to defts O. David Bevins, Ruby Salyer, Ann Christina Sullivan, Marty Prince, M.D., Charles Fulton, M.D., Isam Zebdah, M.D., A.W. North, M.D., Charles P. Maine, M.D. and R. Cartegena, M.D. Copies cert. & rec. in CIV.O.B. *41, p. 19. /lb

11/2/88 Rec'd PLAINTIFF'S MEMORANDUM IN RESPONSE TO JUDGE WILLIAMS' ORDER TO DISMISS THE ADDED DEFENDANTS. /lb

11/4/88 LETTER dtd 11/3/88 from B. Eskridge to Judge Williams in response to pltf's Memorandum in Response to Judge Williams' Order to Dismiss.

11/8/88 MOTION TO QUASH SERVICE, filed by Sullivan. /lb

11/9/88 MOTION TO QUASH PROCESS by defts., Bevins, Prince, Fulton & Maine. /bhs

11/14/88 MOTION TO QUASH PROCESS by deft. Ruby Salyers & Dr. A. W. North. /bhs

11/14/88 LETTER dated 11/7/88 to court from pltf. requesting the court to vacate its Order of October 26, 1988. /bhs

11/14/88 LETTER dated 11/7/88 from pltf. enclosing returns of service & further requesting the court to uphold order of 10/26/88. (Service returned as follows: Sister Anna Sullivan, Dr. R. Cartegena, Dr. Charles Fulton & Dr. Isam Zebdah on 10/29/88; upon Dr. Marty Prince, Dr. Charles P. Maine, Dr. A. W. North, Ruby Salyer & O. Daniel Beverie (North Community Hospital on 10/31/88, & upon Dr. Charles Fulton on 11/5/88. /bhs

11/16/88 ORDER enter'd that pltf's motion to vacate order of Oct. 26, 1988 is denied; & in accordance with FRCP 54(b), final judgment is ent'd in favor of O. David Bevins, Ruby Salyer, Christina Sullivan, Marty Prince, M.D., Charles Fulton, M.D., Isam Zibdeh, M.D., A. W. North, M.D., Charles P. Main, M.D. & R. Cartegena, M.D. Copies cert'd & rec'd in CIV.O.B. #41, at page 50. /bhs

11/22/88 LETTER dtd 11/18/88 to Judge Williams from pltf. swearing that as stated in pltf's letter of 11/7/88 is correct. /lb (proposed

. . . .

11/28/88 Rec'd PLAINTIFF'S MEMORANDUM IN RESPONSE TO DEFENDANT'S MOTION TO QUASH PROCESS. /lb

12/1/88 ORDER dtd 11/30/88 ent'd that pltf's Memorandum and proposed Order is being treated as a motion to alter or amend a judgment pursuant to FRCP 59(e), and this mtn is denied. Respective mtns to quash process filed on behalf of individual defts are sustained and process against individual defts is valid and of no effect. Final judgment is ent'd in favor of defts P. David Bevins, Ruby Salyer, Christina Sullivan, Marty Prince, M.D., Charles Fulton, M.D., Isam Zibdeh, M.D., A.W. North, M.D., Charles P. Maine, M.D. and R. Cartagena, M.D. Action is cont'd for further proceedings as to hospital defts. Copies cert. & rec. in CIV.O.B. #41, p. 8. . . .

12/16/85 LETTER dtd 12/12/88 from pltf. to Judge Williams requesting a final decision be made. /lb

1/9/89 OCR B. Dickert's Notes & recordings filed in Box #89-1 in Abingdon Clerk's Office of hearing on October 7, 1988. /bhs

2/24/89 MEMORANDUM OPINION AND ORDER dtd 2/23/89 ent'd that pltf's claims are dismissed and case is stricken from docket of this ct. Copies cert. & rec' in CIV.O.B. #42, p. 63. /lb

3/27/89 NOTICE OF APPEAL by pltf. /bhs

Plaintiff: THOMPSON, Levester

Defendants: WISE GENERAL HOSPITAL
SALYER, Ruby (10/20/87)
NORTH, Dr. A.W. (10/20/87)
MAINE, Dr. Charles P. (10/20/87)
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No. 90-22

AUG 1 1990

In The

Supreme Court of the United States

October Term, 1989

LEVESTER THOMPSON, M.D.,

Petitioner,

v.

WISE ARH GENERAL HOSPITAL, ST. MARY'S HOSPITAL, INC., NORTON COMMUNITY HOSPITAL AND LONG TERM CARE FACILITY, O. DAVIS BEVINS, RUBY SALYER, SISTER ANNE CHRISTINA SULLIVAN, MARTY PRINCE, M.D., CHARLES FULTON, M.D., ISAM ZEBDAH, M.D., A.W. NORTH, M.D., CHARLES P. MAINE, M.D., AND R. CARTEGENA, M.D.,

Respondents.

BRIEF BY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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LIST OF PARTIES AND RULE 29.1 LIST

The petitioner in this case is Levester Thompson, M.D. The individual respondents are O. Davis Bevins, Ruby Salyer, Sister Anne Christina Sullivan, Marty Prince, M.D., Charles Fulton, M.D., Isam Zebdah, M.D., A. W. North, M.D., Charles P. Maine, M.D., and R. Cartegena, M.D. The corporate respondents are St. Mary's Hospital, Inc., Norton Community Hospital and Long Term Care Facility, and Wise ARH General Hospital.

St. Mary's Hospital, Inc., is a non-profit, non-stock corporation without any parent company or subsidiaries. Norton Community Hospital and Long Term Care Facility is a non-profit, non-stock corporation that is wholly owned by Norton Community Health Services, Inc., which, in turn, has no parent company or subsidiaries, other than wholly owned subsidiaries. Wise ARH General Hospital is owned by Appalachian Regional Health Care, Inc., a non-profit, non-stock corporation, which has no parent company or subsidiaries.

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No. 90-22

In The

Supreme Court of the United States

October Term, 1989

LEVESTER THOMPSON, M.D.,

Petitioner,

v.

WISE ARH GENERAL HOSPITAL, ST. MARY'S HOSPITAL, INC., NORTON COMMUNITY HOSPITAL AND LONG TERM CARE FACILITY, O. DAVIS BEVINS, RUBY SALYER, SISTER ANNE CHRISTINA SULLIVAN, MARTY PRINCE, M.D., CHARLES FULTON, M.D., ISAM ZEBDAH, M.D., A.W. NORTH, M.D., CHARLES P. MAINE, M.D., AND R. CARTEGENA, M.D.,

Respondents.

BRIEF BY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINION BELOW

The opinion of the United States District Court for the Western District of Virginia is now reported at 707 F. Supp. 849 (W.D. Va. 1989).

STATEMENT OF THE CASE

The Petitioner, Dr. Levester Thompson, is a black physician who formerly practiced medicine in Wise

County, Virginia, and now practices in Emporia, Virginia. The respondents include three Wise County hospitals, their respective hospital administrators, and six local physicians who served on one or more of the hospitals' medical staffs during the period in question. This case arises out of separate decisions by the respondent hospitals to terminate all or part of Thompson's hospital privileges over a two-year period: first St. Mary's terminated all his privileges in November, 1984; then Wise General terminated his obstetrical privileges in January, 1986; and lastly Norton Community terminated his ICU privileges in August, 1986. Each termination occurred after one or more patients under Thompson's care developed serious health complications while at the hospital in question.

Thompson's Petition for the Writ of Certiorari does not adequately set out the protracted procedural history in the trial court below. Ignoring this history, Thompson intimates that the trial court dismissed his claims without affording him an adequate opportunity to plead his case. To correct the misstatements contained in Thompson's Petition and to demonstrate that there is no merit to Thompson's alleged procedural irregularities, respondents are providing this statement of the case.

As the statement of the case will show, during the two years this case was before the trial court, Thompson's three separate attorneys filed three radically different complaints which successively added and dropped parties and causes of action without rhyme or reason. Throughout this convoluted process, the trial court, with remarkable patience, gave Thompson every reasonable opportunity to advance his case beyond the pleading stage. Despite repeated efforts, Thompson was never able

to allege sufficient facts or cognizable claims to avoid dismissal of his case.

(a) Thompson's Original Complaint as Pled by His First Attorney

Thompson's first counsel, Chester Smith, Esq., filed an original complaint on Thompson's behalf against the respondents in December of 1986. The initial complaint was exceedingly vague on the causes of action asserted or the facts in support thereof. (Appendix at 1-15.) In a conclusory fashion, Smith pled that the respondents, acting pursuant to some undefined "conspiracy," had violated Thompson's civil rights by terminating his staff privileges at the three respondent hospitals on the basis of his race. Smith asserted that the termination of Thompson's privileges on racial discrimination grounds violated §§ 1981, 1985(3) and 1986 of the Civil Rights Acts, 42 U.S.C. §§ 1981, 1985(3) and 1986 (1982).

In response, the respondents filed motions for more definite statements because the complaint was devoid of sufficient facts to permit a response. Smith filed a written response and appeared on Thompson's behalf to oppose the motions at a hearing in March of 1987. At the hearing, the trial court granted respondents' motions in part and ordered Thompson to state facts that would clarify the nature of his conspiracy claim, specify what acts gave rise to each respondent's individual liability, and indicate on what factual basis Thompson contended he had a contract with the respondents, the interference with which would allegedly support a § 1981 claim.[1]

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[1] In his Petition, Thompson quotes the trial court's ruling on the respondents' motions for more definite statements. (Pet. at 9 n.1.)

(b) - Thompson's Amended Complaint As Pled by His Second Attorney

Following the March 1987 hearing, Smith filed a motion voluntarily dismissing Thompson's § 1985(3) and § 1986 conspiracy claims. Smith also filed a more definite statement. Before the respondents could respond to Smith's revised pleading, however, Bruce Shine, Esq., filed a notice of appearance as Thompson's additional counsel. Shine moved for leave to file an amended pleading, ignoring the more definite statement that Smith had filed. The trial court granted Shine's motion and thereafter granted Shine a series of extensions for filing the amended complaint.

Not until October of 1987 did Shine file the first amended complaint on Thompson's behalf. Shine's amended complaint added back the § 1985(3) conspiracy claim that Smith had voluntarily dismissed and named only the three hospitals as defendants. Shine also filed a separate motion voluntarily dismissing Thompson's action against the eight doctors and three hospital administrators originally sued, which the trial court granted.

The hospital respondents promptly filed motions to dismiss and answers to Shine's amended complaint. The respondents moved to dismiss the § 1981 and § 1985(3) claims under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Additionally, respondent St. Mary's Hospital asserted a statute of limitations defense to both causes of action and filed a brief in support of its pleadings.

St. Mary's contended in its brief that the statute of limitations had run on Thompson's civil rights claims

because he did not file his suit within two years after his privileges at the hospital were revoked. Additionally, St. Mary's contended that the amended complaint did not allege sufficient facts to establish a § 1985(3) conspiracy claim. Finally, St. Mary's argued that Thompson had no § 1981 claim because: (1) the "equal benefits" prong of § 1981 required state action, which was not present since St. Mary's was a private institution; and (2) the "contract" prong of § 1981 was not available to Thompson because hospital staff privileges are not contractual in nature.

The other two hospital respondents adopted the arguments in St. Mary's brief in support of their own Rule 12(b)(6) motions to dismiss. These hospitals did not join in St. Mary's statute of limitations defense because that defense was not available to them.

Upon receipt of St. Mary's brief, the trial court ordered Thompson to respond. Shine, Thompson's second attorney, thereupon filed a motion to withdraw. The trial court granted Shine's motion in April of 1988 and directed Thompson to obtain new counsel within thirty days.

(c) Thompson's Second Amended Complaint as Pled by His Third Attorney

In June, 1988, Sa'ad El-Amin, Esq., filed a notice of appearance as Thompson's new counsel. El-Amin also filed a motion to add as additional parties the doctors and hospital administrators that Thompson, through earlier counsel, had voluntarily dismissed. El-Amin further requested leave to amend Thompson's complaint yet

again to allege new causes of action against all respondents. Finally, El-Amin filed a brief in opposition to St. Mary's motions to dismiss and statute of limitations defenses. The trial court granted El-Amin's motions and ordered him to provide enough copies of the second amended complaint to the clerk to permit service on the non-hospital defendants to be added back into the case.

Thompson's second amended complaint, as prepared by El-Amin, consisted of five causes of action. (Appendix at 82-126.) El-Amin set out Thompson's civil rights claims in counts one and four. In count one El-Amin alleged that the respondents conspired to deprive Thompson of his livelihood as a physician by terminating his privileges at the three hospitals because of his race in violation of 42 U.S.C. § 1985(3). In count four El-Amin alleged that the respondents' actions interfered with Thompson's contractual relations in violation of 42 U.S.C. § 1981. Count three contained Thompson's other federal claim – that the respondents' actions violated the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1982). Finally, in counts two and five, El-Amin alleged that the respondents' termination of Thompson's hospital privileges violated various Virginia statutes and common law.

The hospital respondents again filed motions to dismiss and St. Mary's renewed its statute of limitations defense. The three hospitals additionally raised statute of limitations defenses to the state law claim in count two. All three hospitals moved to dismiss the antitrust count for failure to state a claim.

(d) Withdrawal of Thompson's Third, and Last, Attorney; Dismissal of the Non-Hospital Respondents

Contemporaneously with the hospitals' filing of their responses, El-Amin filed a motion to withdraw as counsel, which the trial court granted in August, 1988. The court directed that the second amended complaint not be served on the non-hospital respondents that El-Amin had sought to reinstate as parties – but had not yet served – until such time as Thompson obtained new counsel, who would agree to assume responsibility for the allegations stated in the second amended complaint.[2] The trial court granted Thompson thirty days to obtain new counsel. In September, 1988, after Thompson's time to obtain new counsel had run, the trial court gave him an additional thirty days to effect service on the non-hospital respondents. The trial court also set a hearing on the pending defense motions for October 7, 1988.

At the October 7 hearing, the parties presented oral argument on respondent hospitals' motions to dismiss, with Thompson representing himself.[3] The trial court

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[2] Thompson's first counsel, Chester Smith, had remained in the case until this time although he had not signed the second amended complaint or otherwise assumed responsibility for it. With El-Amin's withdrawal as counsel, Smith likewise sought leave to withdraw, which the trial court permitted in August 1988.

[3] In his Petition, Thompson alleges that on the morning of the October 7 hearing, the trial court refused to grant an extension requested by Thompson's "would-be new law firm" during a long distance phone call. (Pet. at 10-11.) Actually, the trial court correctly refused to postpone the hearing, which had been properly noticed, because of the last-minute nature of the

(Continued on following page)

directed the parties to present any written argument they chose within fifteen days after the hearing.

Counsel for hospital respondents and Thompson, acting *pro se*, filed additional written argument within this time frame. Thompson also improperly filed certain "in camera" material for the trial court to consider in ruling on the motions to dismiss. This material was never disclosed to respondents' counsel, until it appeared in Thompson's Petition to this Court. (Appendix at 16-72.)

On October 26, 1988, the trial court entered an order dismissing Thompson's action against the non-hospital respondents because Thompson failed to effect service within the thirty days ordered by the court. The dismissal order was designated as final pursuant to Federal Rule of Civil Procedure 54(c). Thompson then filed a "Memorandum In Opposition" within fifteen days thereafter, which the court ultimately treated as a motion to vacate. In late October and early November, in direct contravention of the court's October 26 ruling, Thompson effectuated service on the non-hospital respondents. This service was promptly challenged by motions to quash. On November 16, 1988, the trial court entered another order as to the non-hospital respondents quashing service, denying

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(Continued from previous page)

extension request and because the new law firm was not making an appearance on Thompson's behalf; it was asking only for additional time to consider the possibility of representing Thompson. The law firm, which would have been the fourth to appear in the case as Thompson's counsel, apparently elected not to represent Thompson as it subsequently made no formal appearance.

Thompson's motion to vacate, and dismissing Thompson's action against them. This order was likewise designated final pursuant to Rule 54(c).

On November 28, 1988, Thompson filed yet more papers arguing against dismissal of the non-hospital respondents. The trial court treated Thompson's filing as an additional motion to vacate the judgement and denied it by a third Rule 54(c) order entered on November 30, 1988. Thompson did not appeal this order to the Fourth Circuit Court of Appeals within thirty days thereafter as required by law.

(e) Dismissal of the Hospital Respondents

On February 23, 1989, the trial court entered an order dismissing Thompson's action against the hospital respondents for the reasons set out in the court's accompanying opinion. *Thompson v. Wise General Hospital*, 707 F. Supp. 849 (W.D. Va. 1989), *aff'd*, No. 89-2055 (4th Cir. Jan. 30, 1990). Essentially, the trial court dismissed the § 1985(3) claim because Thompson failed to allege sufficient facts of conspiracy. The court observed that the conspiracy allegations were conclusory in nature and were devoid of any material facts to suggest the requisite meeting of the minds.[4]

---

[4] The trial court described the absence of sufficient facts to support a conspiracy claim in the amended complaint as follows:

> Assuming that everything happened exactly the way the complaint alleges that it did, the most that it has

(Continued on following page)

The trial court likewise dismissed the § 1981 claim because the private nature of the hospital respondents precluded that claim under § 1981's "equal benefits" prong, and Thompson had no contractual right to hospital privileges to support a claim under § 1981's "contract" prong. *Id.* at 852-53. The trial court also dismissed the antitrust claim because Thompson had failed to allege sufficient facts to show how the respondents' alleged conduct affected interstate commerce, a jurisdictional prerequisite. *Id.* at 854-56. Finally, the trial court dismissed the two state law counts for lack of pendent jurisdiction. *Id.* at 856.

(Continued from previous page)

shown is that each hospital, apparently acting independently, terminated Dr. Thompson's privileges for problems that were someone else's fault. Notably, the termination by Wise General came 14 1/2 months after the termination by St. Mary's, and Norton Community terminated Dr. Thompson's ICU privileges more than six months after that, or nearly two years after St. Mary's. A hospital, being an inanimate entity, cannot itself conspire with anyone or anything; some human agency must be involved. There is no indication in the complaint of who, when, how, or where any doctors, administrators, or other individuals connected with any of the defendants conspired to deprive Dr. Thompson of any rights or privileges. And the timetable of the terminations, spread out over two years, is hardly silent evidence of a conspiracy.

Thompson v. Wise Gen. Hosp., 707 F. Supp. at 852.

(f) Thompson's Appeal to the Fourth Circuit as to the Hospital Respondents

Thompson, acting *pro se*, filed a timely notice of appeal of the February 23, 1989, order dismissing the hospital respondents. The Fourth Circuit, thereafter, pursuant to Local Rule 34(b), directed the parties to file informal briefs because of Thompson's *pro se* status. Subsequent to the filing of briefs, hospital respondents' counsel presented to the Fourth Circuit additional argument for dismissing Thompson's § 1981 claim based on the recently decided case of *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989).

By unpublished opinion, the Fourth Circuit, on January 30, 1990, affirmed the trial court's dismissal of Thompson's civil rights, antitrust and state law claims for the reasons articulated in the trial court's written opinion. The Fourth Circuit additionally held that *Patterson* also foreclosed Thompson's § 1981 claim. Finally, the Fourth Circuit noted that Thompson's appeal was not timely as to the non-hospital respondents, who had been dismissed by the earlier Rule 54(c) order. Thompson had not thereafter filed an appeal of that dismissal order within the requisite 30-day period. (Appendix at 156-59.) Thompson then moved for a rehearing in the Fourth Circuit, which was denied on March 13, 1990.

(g) Thompson's Petition for a Writ of Certiorari

Thompson filed a Petition for a Writ of Certiorari with this Court on April 27, 1990, without providing notice or a copy of the Petition to any of respondents' counsel. The Clerk of this Court subsequently rejected

that Petition as not being in compliance with this Court's rules. Thompson then filed a second Petition in early July of 1990, copies of which were first received by one of respondents' counsel on July 5, 1990.

In his Petition, Thompson assigns error only to matters dealing with his civil rights claims under § 1981 and § 1985(3). He does not assign error or otherwise address the merits of the dismissal of his antitrust claim or the Fourth Circuit's ruling that his appeal was untimely as to the non-hospital respondents.[5]

SUMMARY OF REASONS FOR DENYING THE WRIT

The courts below fully considered and correctly decided the issues which Thompson raises in his Petition. First, the courts correctly held that Thompson did not have a cognizable claim under 42 U.S.C. § 1981 against the respondents for terminating his hospital privileges at the three hospitals in question. Section 1981 requires state action for recovery under the "equal benefits" clause, which was absent in this case. Additionally, hospital privileges do not confer contractual rights so as to support a claim under the "contract" clause of § 1981. Finally, even

[5] Thompson's failure to assign error to the rulings below on the antitrust issue and the untimeliness of his appeal as to the non-hospital respondents represents a waiver on his part to seek review in this Court. *See Phillips Co. v. Dumas Indep. School Dist.*, 361 U.S. 376, 386 (1960); Sup. Ct. R. 14.1(a). The respondents accordingly will not address the merits of these decisions in this brief other than to endorse the lower courts' reasons for ruling against Thompson.

if hospital privileges were to confer contractual rights, this Court's recent decision in *Patterson v. McLean Credit Corporation*, 109 S. Ct. 2363 (1989), precludes recovery under § 1981 because the conduct in question postdated alleged contract formation.

Second, the courts below correctly decided that Thompson failed to state a claim of conspiracy under 42 U.S.C. § 1985(3). Despite three attempts through three separate attorneys, Thompson never provided any facts to show that any of the respondents conspired to harm him because of his race. The case law followed by the courts below correctly holds that a sufficient § 1985(3) claim must go beyond pure conclusory allegations to state the factual basis of the claim, which is totally lacking in Thompson's pleadings.

Third, the trial court provided Thompson every opportunity to present his claim and did not commit the numerous procedural errors Thompson vaguely alleges in his Petition.

Fourth, although the courts below did not reach the issue, the statute of limitations plea of two of the respondents, St. Mary's and Sister Anne Christina Sullivan, bars Thompson's § 1981 and § 1985(3) claims against them. Thompson did not file his action against these respondents within two years after St. Mary's terminated his privileges, which is when his cause of action would have accrued. Thompson's effort to avoid the statute of limitations with his "continuing violation" tolling argument is unsupported by the applicable case law. This case law recognizes that the statute of limitations begins to run

upon termination of the professional or employment relationship and is not thereafter tolled by subsequent efforts by the plaintiff to obtain a reversal of that termination.

REASONS FOR DENYING THE WRIT

(a) The Central Issue in This Case Was Correctly Decided Below: Thompson Does Not Have a Cognizable § 1981 Claim Against the Respondents for Terminating His Hospital Privileges.

In the second and fourth "Questions Presented," and in his second argument, Thompson sets forth his central claim that respondents unlawfully interfered with his contractual rights in violation of 42 U.S.C. § 1981 when they separately terminated his hospital privileges. He contends the trial court erred in dismissing count four of his second amended complaint, which sets out the § 1981 claim. (Appendix at 120-21.) As the courts below correctly held, however, § 1981 does not afford Thompson a cause of action under the facts alleged.

Section 1981 protects the rights of racial minorities "to make and enforce contracts" and to enjoy the "equal benefits" of law. The statute thus contains two separate prongs which will support a § 1981 claim. The courts below correctly recognized that neither prong was available to Thompson.

Thompson had no claim under the "equal benefits" clause because recovery under this clause requires proof of state action. As the Third Circuit has correctly stated:

> The words "full and equal benefit of all laws and proceedings for the security of persons and

> property" . . . suggest a concern with the relations between the individual and the state, not between two individuals. The state, not the individual, is a sole source of law, and it is only the state acting through its agents, not the private individual, which is capable of denying to blacks the full and equal benefit of the law. Thus, . . . the concept of state action is implicit in the equal benefit clause.

Mahone v. Waddle, 564 F.2d 1018, 1029 (3rd Cir. 1977), *cert. denied*, 438 U.S. 904 (1978).

The Fourth Circuit approved the state action requirement recognized in *Mahone* in *Eggleston v. Prince Edward Volunteer Rescue Squad, Inc.*, 569 F. Supp. 1344 (E.D. Va. 1983), *aff'd*, 742 F.2d 1448 (4th Cir. 1984), and *Shaare Tefila Congregation v. Cobb*, 785 F.2d 523 (4th Cir. 1986), *rev'd on other grounds*, 481 U.S. 615 (1987). In *Eggleston*, the Fourth Circuit affirmed the district court's holding that a black plaintiff had no § 1981 "equal benefits" claim against a volunteer rescue squad that had dismissed him, because no state action was involved. In *Shaare*, the Fourth Circuit affirmed the granting of a motion dismissing plaintiff's § 1981 "equal benefits" claim, finding, *inter alia*, that there was no state action in the private defendants' desecration of a Jewish synagogue.

Each of the respondent hospitals is a private hospital. As such, each hospital's decision concerning staff privileges did not constitute the requisite state action to support recovery under the civil rights laws. *See Carter v. Norfolk Community Hospital Ass'n*, 761 F.2d 970 (4th Cir. 1985); *Modaber v. Culpepper Memorial Hospital, Inc.*, 674

F.2d 1023 (4th Cir. 1982). Consequently, Thompson possessed no cognizable § 1981 claim under the "equal benefits" prong.

Similarly, Thompson failed to establish a claim under the "contract" prong of § 1981, even though this clause does not require state action. This clause, as the statutory language reveals, requires only interference with contract rights. The hospital privileges Thompson lost, however, were not contractual in nature. Hospital privileges confer associational status only and not a contractual right that can be enforced in the courts. *Guibor v. Manhattan Eye, Ear & Throat Hospital*, 413 N.Y.S.2d 638, 639, 386 N.E.2d 247 (N.Y. 1978) (At common law "denial of staff privileges for whatever reason, or for no reason at all, constituted no legal wrong.") *See also Manczur v. Southside Hospital*, 183 N.Y.S.2d 960 (N.Y. Sup. Ct. 1959); *Loewinthan v. Beth David Hospital*, 9 N.Y.S.2d 367 (N.Y. Sup. Ct. 1938); *Weary v. Baylor University Hospital*, 360 S.W.2d 895 (Tex. Ct. App. 1962); *Hodges v. Arlington Neuropsychiatric Center, Inc.*, 628 S.W.2d 536 (Tex. Ct. App. 1982); *Grossling v. Ford Memorial Hospital*, 614 F. Supp. 1051 (E.D. Tex. 1985); *Wood v. Hilton Head Hospital, Inc.*, 292 S.C. 403, 356 S.E.2d 841 (1987). *Cf. Khoury v. Community Memorial Hospital, Inc.*, 203 Va. 236, 245, 123 S.E.2d 533, 539 (1962) (Doctor has no constitutional right to be granted privileges which a private hospital must honor.). The Fourth Circuit has similarly held that an organization's grant of associational status – as occurs with hospital privileges – does not confer contractual rights which are protected by § 1981. *Eggleston v. Prince Edward Volunteer Rescue Squad*, 569 F. Supp. 1344 (E.D. Va. 1983), *aff'd*, 742 F.2d 1448 (4th Cir. 1984) (termination of membership status in rescue squad).

An examination of Thompson's relationship with the hospital respondents demonstrates that it was not contractual in nature. Thompson paid no fee to enjoy privileges and the hospitals received no direct pecuniary consideration in return. Furthermore, Thompson could have unilaterally surrendered his privileges and the hospitals would have had no contractual claim against him. Thus, there was no consideration or mutuality of obligation to support a contract. As the common law recognizes, the essential components of an enforceable contract simply do not exist in the context of hospital privileges. Thompson's § 1981 claim under the "contract" prong must accordingly fail.

But even if hospital privileges under Virginia law conferred contractual rights to Thompson, he would still have no § 1981 claim. This Court recently held that § 1981 only reaches racial discrimination which interferes with the formation or enforcement of contracts, and not alleged discriminatory treatment which occurs *after* contract formation:

> [T]he right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, *including breach of the terms of the contract* or imposition of discriminatory working conditions. *Such post-formation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII.*

Patterson v. McLean Credit Corporation, 109 S. Ct. 2363, 2373 (1989) (emphasis added).

The Fourth Circuit, in its decision below, held Thompson's claim of discriminatory termination of his hospital privileges, which involved conduct after alleged "contract" formation, was barred under *Patterson*. (Appendix at 158.) The better reasoned federal cases have similarly interpreted *Patterson* to bar a § 1981 claim for termination of contract rights. These courts have held that plaintiffs in such contexts are limited to state law and Title VII remedies. *See McKnight v. General Motors Corp.*, Nos. 89-1379 and 89-1526 (7th Cir. July 2, 1990) (1990 WL 89739); *Courtney v. Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845 (9th Cir. 1990); *Lavender v. V & B Transmissions & Auto Repair*, 897 F.2d 805 (5th Cir. 1990); *Carroll v. General Accident Insurance Co.*, 891 F.2d 1174 (5th Cir. 1990); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990); *Singleton v. Kellogg Co.*, No. 89-1073 (6th Cir. Nov. 29, 1989) (1989 Lexis 17920); *Joseph v. Zachary Manor Nursing Home*, 729 F. Supp. 41 (M.D. La. 1990); *Williams v. BLM Co.*, 731 F. Supp. 231 (N.D. Miss. 1990); *Johnson v. United States Elevator Corp.*, 723 F. Supp. 1344 (E.D. Mo. 1989); *Rivera v. AT&T Information Systems, Inc.*, 719 F. Supp. 962 (D. Colo. 1989); *Greggs v. Hillman Distributing Co.*, 719 F. Supp. 552 (S.D. Tex. 1989). Under the construction of § 1981 promulgated in *Patterson*, Thompson has no § 1981 claim for termination of his hospital privileges.

In summary, because the respondent hospitals are not state actors so as to trigger the "equal benefits" clause of § 1981 and Thompson had no contractual relationship with the hospitals, he has no enforceable civil rights action under § 1981. Moreover, even assuming that hospital privileges do confer contractual rights, *Patterson* and

its progeny demonstrate that Thompson would still lack a § 1981 remedy. For these reasons this Court should not grant Thompson's Petition for a writ of certiorari on this issue.

(b) The Courts Below Correctly Held Thompson Had Not Sufficiently Stated a Conspiracy Claim to Survive Respondents' Motions to Dismiss.

In his second "Questions Presented," and his first argument, Thompson assigns error to the dismissal of his conspiracy claim as set out in Count I of his second amended complaint. In that count, Thompson alleged in conclusory language that the respondents conspired to deprive him of his livelihood in violation of 42 U.S.C. § 1985(3). (Appendix at 115-116.) Nowhere, however, did Thompson in that complaint (or in his two earlier complaints) allege conspiracy "with sufficient specificity and factual support to suggest a 'meeting of the minds' " by the alleged conspirators. *Deck v. Leftridge*, 771 F.2d 1168, 1170 (8th Cir. 1985). Mere conclusory allegations of conspiracy, as contained in Thompson's various complaints, will not survive a motion to dismiss. *See Arsenaux v. Roberts*, 726 F.2d 1022 (5th Cir. 1982) (citing *Slotnick v. Staviskey*, 560 F.2d 31, 33 (1st Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978)); *Briscoe v. Lahue*, 663 F.2d 713, 723 (7th Cir. 1981), *aff'd*, 460 U.S. 325 (1983); *Pillette v. Detroit Police Department*, 661 F. Supp. 1145 (E.D. Mich. 1987), *aff'd*, 852 F.2d 1288 (6th Cir. 1988); *Mosher v. Saalfeld*, 589 F.2d 438 (9th Cir. 1978), *cert. denied*, 442 U.S. 941 (1979); *Croatan Books, Inc. v. Commonwealth of Virginia*, 574 F. Supp. 880 (E.D. Va. 1983); *Davis v. Sprouse*, 405 F. Supp. 45, 46-47 (E.D. Va. 1975).

The courts below correctly held that Thompson's factual allegations do no more than show successive independent action by the three hospital respondents to terminate Thompson's privileges over a twenty-month period. Each termination occurred only after certain patients developed serious health complications while in Thompson's care. St. Mary's Hospital first terminated Thompson's privileges in November of 1984 without any alleged consultation by its employees or agents with any of the employees or agents of the other two hospital respondents. Wise General Hospital subsequently terminated Thompson's obstetrical privileges over a year later in January of 1986. Norton Community Hospital finally terminated Thompson's ICU privileges in August of 1986.

Thompson, through his former counsel, conceded in the trial court that each hospital could not conspire with its own medical staff because of the general rule that a corporation and its agents constitute a single legal entity. *See Marmott v. Maryland Lumber Co.*, 807 F.2d 1180 (4th Cir. 1986), *cert. denied*, 482 U.S. 929 (1987); *Buschi v. Kirven*, 775 F.2d 1240 (4th Cir. 1985); *Bowman v. State Bank of Keysville*, 229 Va. 534, 331 S.E.2d 797 (1985). Thompson nowhere alleged facts in any of his complaints to suggest conspiratorial consultation among or between agents or employees of the three hospitals prior to any decision on his privileges. Thus, the facts to support the requisite "meeting of the minds" for a § 1985(3) claim are simply nowhere pled.

Thompson was afforded three attempts in the trial court to plead an adequate conspiracy claim. Yet each time his counsel alleged conspiracy in conclusory terms

without any factual support. Absent such factual allegations, the courts below properly ruled that Thompson had failed to state an adequate § 1985(3) claim. This Court accordingly should refuse Thompson a writ as to this issue.

(c) The Courts Below Committed No Procedural Errors to Justify this Court Granting a Writ.

Thompson assigns several errors of a procedural nature in his first and sixth through ninth "Questions Presented." These questions are largely unintelligible and there are no corresponding arguments in the Petition to explain their meaning. Under Supreme Court Rule 14, Thompson's failure to state his questions and arguments clearly is itself a sufficient ground for this Court to deny his Petition. To the extent it is possible to discern what Thompson is complaining about as to the procedural issues he raises, a brief reference to the procedural history in the case will show there is absolutely no merit to them.

First, in question one Thompson apparently criticizes the trial court for refusing to entertain the "in camera" material he filed by letter to the court in October of 1988. Thompson never provided this material to respondents' counsel until he included it in his Petition to this Court. The material appears to be a consultant's report sent to Dr. Thompson's counsel. The consultant apparently reviewed from a malpractice perspective the five cases that had resulted in the hospital respondents terminating Dr. Thompson's privileges. After his last counsel withdrew from the case, Thompson submitted this material to

the trial court in response to hospital respondents' pending Rule 12(b)(6) motions to dismiss.

The trial court certainly was correct in not considering this material in deciding the merits of the 12(b)(6) motions. Not only was the material improperly submitted, it was irrelevant to the trial court's ruling on the motions to dismiss. These motions did not require the trial court to consider the issue of Dr. Thompson's malpractice; the motions raised legal objections to the sufficiency of his pleading on other issues entirely, as the prior sections of this brief demonstrate. Thus, Thompson's assignment of error on this point is without merit.

Similarly, Dr. Thompson has not identified a meritorious error in his sixth "Question Presented." The question is largely unintelligible but respondents assume the question represents criticism of the trial court for not permitting Thompson to proceed to trial on the merits of his claims. Thompson fails to recognize that his right to trial arose only after he had stated a sufficient cause of action in his pleadings. In granting the respondents' 12(b)(6) motions, the trial court obviously concluded that Thompson had not, despite three efforts, sufficiently pled a claim upon which relief could be granted. Since the trial court found the 12(b)(6) motions to have merit, it had no discretion but to dismiss Thompson's complaint. Thus, there is obviously no error to support a writ on this issue.

Thompson's question seven is likewise obscure and unenlightening. It is difficult to discern what Thompson means by his allegation that the trial court ignored his counsel and issued orders directly to him. The only

orders the trial court issued directing Thompson to do anything, as opposed to his counsel, occurred after his last counsel had withdrawn from the case in August of 1988, and Thompson thereafter elected to proceed *pro se*. Orders subsequent to that time by necessity treated Thompson as his own counsel. Accordingly, Thompson's petition for a writ on this point is absurd.

In question eight, Thompson accuses the trial court of making improper use of sanctions under Federal Rule of Civil Procedure 11. The trial court, however, never imposed any sanctions against Thompson or his attorneys. It did refer to Rule 11 in its August 8, 1988, order permitting Thompson's third attorney to withdraw. The order directed the Clerk not to issue service on the non-hospital respondents, who Thompson's third counsel had named as additional parties but had not served, until Thompson had procured new counsel who would accept responsibility for the pleadings pursuant to Rule 11. There was nothing improper about this reference, particularly given the convoluted procedural history which preceded the court's order. Therefore, the trial court took no improper action which would support a writ.

In question nine, Thompson appears to assign error to the trial court's decision in November, 1988, granting the non-hospital respondents' motions to quash service and dismissing them from the lawsuit. As the statement of the case reveals, Thompson did not file a timely appeal of the trial court's November dismissal order and thus he has waived any right to obtain a writ on this point. Nevertheless, the respondents' statement of the case correctly sets out the protracted procedural history which predated the court's dismissal order and graphically

demonstrates the wisdom of the trial court's action. The non-hospital respondents had been originally sued by one attorney, voluntarily dismissed by a second, and added back by a third, who thereafter immediately withdrew from the case. Even then, the trial court provided Thompson thirty days to obtain new counsel to effectuate service on the non-hospital respondents, and, when Thompson failed to meet this deadline, gave him an additional thirty days to effectuate service himself. Thompson made no effort to comply with the time limit set out in either order. Therefore, the trial court acted properly in thereafter ordering Thompson's actions against the non-hospital respondents dismissed. There is no basis to grant Thompson a writ on this issue.

(d) Thompson's Failure to File His § 1981 and § 1985(3) Claims Against Respondent St. Mary's Hospital and Its Administrator, Respondent Sister Anne Christina Sullivan, Within Two Years After the Termination of His Privileges Bars His Action as to These Respondents.

In his fifth "Question Presented" Thompson improperly assigns error on an issue that the courts below did not reach – whether the applicable statute of limitations had run on his § 1981 and § 1985(3) claims against St. Mary's Hospital and Sister Anne Christina Sullivan, its administrator. While the courts below did not decide this limitations defense, it provides an additional reason for denying Thompson a writ as to these respondents.

Thompson's own pleadings reveal that his privileges at St. Mary's Hospital were terminated on November 16,

1984. (Appendix at 89, ¶ 21 & 22.) Sister Anne, the Hospital's administrator at the time, in an undisputed affidavit filed with the trial court affirmed that after November 16 Thompson had no further professional relationship with the Hospital. Thompson could have filed a lawsuit relative to termination of his privileges any time after November 16. Yet he did not file his initial complaint until December 23, 1986, over two years later.

This Court has held that, because § 1981 lacks its own limitation period, the forum state's statute governing personal injury claims applies. *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987). In Virginia, the applicable personal injury statute requires suit to be filed "within two years after the cause of action shall have accrued." Va. Code Ann. § 8.01-243(A) (1984).

The federal courts in Virginia have likewise held that conspiracy claims under § 1985 are governed by the same two-year limitations period. *See Brady v. Sowers*, 453 F. Supp. 52 (W.D. Va. 1978); *Harris v. Obenshain*, 452 F. Supp. 1172 (E.D. Va. 1978); *Wilkenson v. Hamel*, 381 F. Supp. 768 (W.D. Va. 1974); *Sitwell v. Burnette*, 349 F. Supp. 83 (W.D. Va. 1972). Under this case law, Thompson's claims under § 1981 and 1985(3) were clearly time-barred when suit was filed over two years after he lost his privileges.

Thompson, however, asserts in his Petition that his civil rights claims are not barred because St. Mary's engaged in a "continuing violation" by failing to afford him a post-termination hearing. Thompson's argument is plainly wrong. He ignores the fact that the substance of his civil rights claims was for damages arising out of loss of his privileges. That act was complete in November of

1984 and at that moment he had a mature right to sue. Any alleged refusal on St. Mary's part thereafter to reconsider its decision does not amount to a "continuing violation" so as to toll the statute of limitations.

The cases Thompson cites at pages 26-28 of his Petition to support his "continuing violation" argument are inapplicable. Contrary to his contention, the Fourth Circuit's decision in *Williams v. Norfolk & Western Railway Co.*, 530 F.2d 539 (4th Cir. 1975), actually supports St. Mary's argument. In that case the Fourth Circuit held that an employee who had retired more than two years before filing his § 1981 claim could not bring that claim as a continuing violation. The court did hold that certain of the retired employee's other claims, not applicable here, had not accrued at the time of his retirement.

Similarly, the other cases Thompson cites in his Petition involve allegations of discrimination in an ongoing employment context. None of the cases apply the "continuing violation" rule to a situation where, as here, the professional relationship had been completely severed. *See, e.g., Cox v. United States Gypsum Co.*, 409 F.2d 289 (7th Cir. 1969) (continuing violation where laid-off workers would have enjoyed prospect of reemployment but for alleged discrimination in subsequent recall decisions).

The applicable case law demonstrates that a plaintiff who has been terminated from a professional or employment relationship cannot avoid the statute of limitations by alleging that a later refusal to reconsider that decision amounts to a "continuing violation" of plaintiff's rights. For instance, in *De Leon Otero v. Rubero*, 820 F.2d 18 (1st Cir. 1987), the First Circuit held that an employer's

refusal to reinstate a demoted employee, after the employee's successful appeal to a personnel administration board, did not convert the initial demotion into a continuing violation of the employee's civil rights.

Similarly, the Fifth Circuit has observed that discharge from employment, as opposed to temporary layoff, cannot give rise to a continuing violation "because the individual ceases to be an employee on the date of his discharge and all of his legal claims mature at that time." *Taylor v. Bunge Corp.*, 775 F.2d 617, 619 (5th Cir. 1985).

Finally, the Fourth Circuit has held that the statute of limitations begins to run on an alleged claim of conspiracy to deny collective bargaining rights at the time of initial discharge and not at any later date when the employer refuses to reinstate the employee. *West v. ITT Continental Baking Co.*, 683 F.2d 845 (4th Cir. 1982). The Fourth Circuit's reasoning is directly applicable to the instant case:

> The change in employment status was the significant event of which [plaintiff] complained. After his discharge from employee status, all of the wrongs alleged relate solely to that event and ITT's refusal to change its decision. Thus the continuing violation doctrine does not apply . . . . Under [plaintiff's] suggested application of the continuing violation doctrine, he could keep his claim of wrongful discharge forever alive by requesting once every three years that ITT reinstate him. This, of course, would destroy the policies of finality and repose underlying the statute of limitations.

Id. at 846 (citations omitted).

As in the cases cited above, Thompson's civil rights allegations against St. Mary's pertain to his termination of privileges in November, 1984. The Hospital's alleged refusal to reconsider that decision cannot convert that discrete act of termination into an ongoing violation. Otherwise, as the Fourth Circuit acknowledged in *West*, Thompson could continually revive his civil rights claims by merely renewing a request for a post-termination reconsideration every two years.

For these reasons, Thompson's § 1981 and § 1985(3) claims as to respondents St. Mary's and Sister Anne Christina Sullivan are time-barred and no writ relative to these claims and these respondents should be granted.

CONCLUSION

The courts below correctly decided the principal issues in this case and the respondents, therefore, urge that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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August, 1990